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No. _____

In The

Supreme Court of the United States

GDF REALTY INVESTMENTS, LTD.; PARKE PROPERTIES I, L.P.; AND PARKE PROPERTIES II, L.P.,

Petitioners,

v.

GALE A. NORTON, Secretary of the Interior, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

After petitioners purchased land near Austin, Texas, the U.S. Fish & Wildlife Service listed as "endangered" six species of insects found only within caves on and around petitioners' land. These tiny subterranean insects have no commercial value and have never been traded in commerce. After FWS asserted that development of petitioners' land would "take" cave insects in violation of the Endangered Species Act, petitioners sought a declaration that FWS's claim of jurisdiction exceeds the limits of the Commerce Clause. The district court upheld jurisdiction on the ground that the proposed commercial use of the property supplied a nexus to interstate commerce. The Fifth Circuit rejected that analysis, holding that to satisfy the Commerce Clause, the regulated conduct (cave insect takes) – not the proposed land use – must substantially affect interstate commerce. The court acknowledged that cave species takes, standing alone, do not affect commerce. Nevertheless, the court upheld FWS's jurisdiction by aggregating the effect of *all takes of all endangered species*. Six judges dissented from denial of rehearing en banc, explaining that such aggregation to justify regulating takes of "wholly intrastate non-economic" species produces "a constitutionally limitless theory of federal protection" that "entirely undercuts *Lopez* and *Morrison*."

The questions presented, as to which the courts of appeal are in disarray, which the Fifth Circuit answered inconsistently with *Lopez* and *Morrison*, and which are of immense practical importance, are as follows:

1. Whether the Fish & Wildlife Service violated the Commerce Clause by regulating "takes" of intrastate, non-economic species under the Endangered Species Act.

2. Whether aggregation of all takes of all endangered species may sustain the regulation of intrastate, non-economic species whose takes, considered alone, do not substantially affect interstate commerce.

RULES 14.1(b) AND 29.6 STATEMENT

Petitioners, GDF Realty Investments, Ltd.; Parke Properties I, L.P.; and Parke Properties II, L.P. are Texas limited partnerships that have never issued shares to the public. They do not have a parent corporation, nor is there any publicly-held company which owns ten percent or more of its stock.

Respondents are: Gale A. Norton, Secretary, United States Department of the Interior; and Steven A. Williams, Director, United States Fish and Wildlife Service.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners GDF Realty Investments, Ltd., Parke Properties I, L.P., and Parke Properties II, L.P. (collectively, "GDF") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, A 1-43) is reported at 326 F.3d 622 (5th Cir. 2003). That court's per curiam order denying GDF's petition for rehearing en banc and the opinion by Judge Jones, joined by Judges Jolly, Smith, DeMoss, Clement and Pickering dissenting from the denial of the petition for rehearing en banc (*id.*, A 75-91) is reported at 362 F.3d 286 (5th Cir. 2004). The opinion of the district court (*id.*, A 44-74) is reported at 169 F.Supp. 2d 658 (W.D. Tex. 2001).

STATEMENT OF JURISDICTION

The decision of the court of appeals upholding the constitutionality of regulations extending the Endangered Species Act to wholly intrastate, non-commercial species was entered on March 26, 2003. The court denied a petition for rehearing on February 27, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. §1254. Jurisdiction in the district court was based on 28 U.S.C. §1331. Jurisdiction in the Court of appeals was based on 28 U.S.C. §1291.

PERTINENT CONSTITUTIONAL PROVISION

The Commerce Clause of the United States Constitution, Article I, §8, cl. 3, provides: "The Congress shall have power . . . [t]o regulate Commerce . . . among the several States."[1]

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[1] Statutory and regulatory provisions relevant to this case are set forth at App., *infra*, A 90-91.

STATEMENT OF THE CASE

The issue in this case is whether the Commerce Clause permits the U.S. Fish and Wildlife Service ("FWS") to regulate "takes" of insect species that inhabit only a few caves and sinkholes in two Texas counties, have no economic value, and have no connection to interstate commerce. FWS has asserted such jurisdiction under the Endangered Species Act ("ESA") in this case and others, asserting that (1) even if the regulated activity ("takes" of cave insects) has no connection to commerce, the proposed commercial use of the land in question supplies the necessary connection, and (2) the regulation can be sustained by aggregating all takes of all endangered species. Appellate decisions adopting these flawed theories raise questions of immense practical and legal importance and threaten to thoroughly undermine this Court's recent Commerce Clause jurisprudence.

In upholding broad federal jurisdiction under the second theory, while properly rejecting the first, the Fifth Circuit seriously misunderstood this Court's precedents, relegating the Commerce Clause to the "intellectual joke" that it had become prior to this Court's decisions in *Lopez* and *Morrison*. Merritt, *Commerce!*, 94 Mich. L. Rev. 674, 691 (1995); *see U.S. v. Lopez*, 514 U.S. 549 (1995); *U.S. v. Morrison*, 529 U.S. 598 (2000). *Lopez* and *Morrison* make clear that Congress may regulate intrastate activity only if that activity substantially affects interstate commerce either alone or, under some circumstances, when aggregated with similar and related economic activities. This Court has *never* upheld a regulation based on the aggregation principle unless the aggregated activity was economic in nature – which in this case it is not. *Morrison*, 529 U.S. at 613. In permitting the bundling of economic and non-economic activity for aggregation purposes, on the theory that all species (including *some* with economic value) form

an "interdependent web," the Fifth Circuit has stripped the Commerce Clause of its most central component – the requirement that regulated activity be commercial or economic in nature. Its holding assures that virtually no scheme of federal regulation will ever fail to pass constitutional muster, provided only that the scheme encompasses some economic activity.

The Fifth Circuit's ruling has deepened serious disagreements among the courts of appeals concerning the proper scope of a major federal statute that affects the use of many millions of acres of land across the Nation. *See Rancho Viejo v. Norton*, 323 F.3d 1062, 1067 & n.2 (D.C. Cir. 2003) (collecting courts' different approaches). Divided panels of the D.C. Circuit have upheld federal regulation of intrastate, non-economic species takes that do not substantially affect commerce on the ground that *regulation* of the takes will produce an effect on commercial development. *Id.* at 1068-69; *Nat'l Ass'n of Homebuilders v. Babbitt* ("*NAHB*"), 130 F.3d 1041, 1048, 1056 (D.C. Cir. 1997) (Wald, J.); *id.* at 1059 (Henderson, J., concurring). A divided panel of the Fourth Circuit and the district court in this case endorsed that analysis. *Gibbs v. Babbitt*, 214 F.3d 483, 495 (4th Cir. 2000); App., *infra*, A 61-63. This Court, however, treated that approach with considerable skepticism in *Solid Waste Agency of Northern Cook County v. United States*, 531 U.S. 159, 173 (2001) ("*SWANCC*"), and the Fifth Circuit correctly rejected it here. Not only would such an approach grant Congress unlimited authority to regulate intrastate activities so long as the regulation is broad or intrusive enough to produce commercial effects, it would also dictate different outcomes in *Lopez* and *Morrison* themselves. *See* App., *infra*, A 24. But the Fifth Circuit rejected that error only to fall into another when it held that intrastate, non-economic cave species takes may be aggregated with all other endangered species in order to create the necessary commercial effect.

Not surprisingly, given the courts of appeals' inability to agree on the appropriate Commerce Clause analysis of regulation of takes of intrastate, non-commercial species and their unwillingness to take *Lopez* and *Morrison* seriously as limits on federal power over local matters, virtually every decision upholding such regulation has provoked a vigorous dissent. No fewer than six judges of the Fifth Circuit dissented from denial of rehearing en banc here (with Judge Edith Jones authoring the dissent), joining an array of distinguished jurists, including Judges Luttig, Roberts, and Sentelle, who have criticized courts' analysis of ESA regulation of localized, non-commercial species.

So long as this disarray among and within courts continues – and time has only sharpened the disagreements – wasteful litigation will proliferate. Absent this Court's review, legal uncertainty will hamper landowners whose properties host even a single example of any of hundreds of intrastate, non-commercial species listed pursuant to the ESA, just as petitioners' twenty-year effort to develop their land has been thwarted. And state and local land use planning will continue to be subjugated, over large swaths of land, to federal regulatory schemes that the Framers never intended to be so intrusive. This Court's intervention is urgently needed.

A. The statutory and regulatory scheme.

The ESA makes it unlawful for any person to "take" any listed endangered species. 16 U.S.C. §1538(a)(1)(B). "Take" is defined in the ESA to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect." 16 U.S.C. §1532(19). "Harm" in the definition of "take" has been expansively defined by FWS to include *indirect* harm to endangered species, including habitat modification such as ordinary land clearing activities. *See Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995). FWS administratively defined "harm" to

mean: "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. §17.3.

Neither the take provision nor the harm regulation contain a jurisdictional element limiting their effect to activities substantially affecting interstate commerce. Thus, the ESA makes unlawful any activity that takes – i.e., kills, injures or even modifies habitat of – a listed species wherever it occurs and without an explicit connection to interstate commerce. *Morrison*, 529 U.S. at 608-09.

Violation of the take provision carries serious criminal and civil penalties, including imprisonment. The ESA imposes criminal penalties of imprisonment for up to one year and fines up to $50,000 for knowing violation of the take provision. 16 U.S.C. §1540(b)(1). The ESA also assigns civil penalties of up to $25,000 for each knowing violation of the take provision. 16 U.S.C. §1540(a)(1).

It is the FWS' application of the take provision to several species of local, cave-dwelling insects lacking any commercial value that is at issue in this case.

B. Petitioners' property and the endangered cave insects.

Petitioners[2] in this case are the owners of approximately 216 acres of undeveloped land in western Travis County, just outside the City of Austin. App., *infra*, A 2.

[2] Fred and Gary Purcell are the sole limited partners of Parke Properties I, L.P. and Parke Properties II, L.P., the owners of an undivided 70% interest in the Hart Triangle Property. Fred Purcell is the sole shareholder of FP Properties, Inc., the General Partner of Parke I and Parke II. Gary Purcell is a Federal Magistrate Judge in Oklahoma City, Oklahoma. The remaining 30% interest in the property is owned by GDF Realty Investments, Ltd.

Petitioners' ownership of the 216 acres traces to 1983, when Dr. Fred Purcell and his brother, Judge Gary Purcell, acquired an interest in a larger tract known as the Parke. After acquiring the property, the Purcells invested substantial time and money developing their property, spending millions of dollars constructing water lines, wastewater gravity lines, force mains, lift stations and other utility infrastructure. *Id.* The Purcells dedicated these utilities to the City of Austin and dedicated a right of way adjoining the highway to Travis County. *Id.* Portions of the property have been final platted, and initial approval for development was granted by the City of Austin in 1984. (RX E:320).[3]

For over 15 years, petitioners have been thwarted in their attempts to recover their substantial investment because of FWS's expansive claim of jurisdiction over the property. In 1988 – several years after the Purcells began development – FWS listed several species of insects that live in caves and sinkholes on the petitioners' property (and in a few other nearby caves) as "endangered" under §4 of the ESA, 16 U.S.C. §1533(a)(1). App., *infra,* A 2. The "endangered" cave insects are: (1) Bee Creek Cave Harvestman; (2) Bone Cave Harvestman; (3) Tooth Cave Pseudoscorpion; (4) Tooth Cave Spider; (5) Tooth Cave Ground Beetle; and (6) Kretschmarr Cave Mold Beetle. *Id.*, A 2-3. These almost microscopic (1.4-7mm in size), eyeless creatures live their entire lives underground in caves, have no commercial value, and have never been bought, sold or traded in commerce in any form or fashion. (RX F:690-691).

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[3] As cited herein, "R" is the Record from the Fifth Circuit proceedings and "RX" is the volume of Record Excerpts filed with the Court of Appeals together with the Brief of Appellants. References to the Record Excerpts are in the form: "RX ___", which means Record Excerpts Tab letter ___, followed by page numbers.

The final rule listing the cave insects as "endangered" was adopted on September 16, 1988.[4] 53 Fed. Reg. 36029. FWS' final rule listing the cave insects did not contain any findings of any connection between the cave insects and interstate commerce. *Id.*

C. Petitioners' dedication of preserves for the cave insects and their efforts to obtain an incidental take permit from FWS.

After listing the cave insects as endangered, FWS asserted jurisdiction over petitioners' property, claiming that development would "take" the cave insects in violation of ESA §9(a)(1)(B). App., *infra,* A 4. At FWS' behest, the Purcells undertook surveys to determine what would be required to protect the endangered cave insects. (RX F:690; RX E:321-322). The Purcells hired James Reddell (the scientist recognized as the leading expert on these cave insects) to survey the cave insects and make recommendations for their protection. Following Dr. Reddell's recommendations, the Purcells deeded several caves and over 10 acres of buffer zones surrounding the caves to Texas Systems of Natural Laboratories, Inc. ("TSNL") – a non-profit foundation dedicated to the research of environmental issues. (RX F:692-693; RX E:321-322). Since their dedication, TSNL has protected the cave species in the deeded preserves. (RX E:321-322).

Although the Purcells' dedication of the cave insect preserves initially satisfied FWS, the agency later changed positions and has for a decade and a half thwarted the development of the petitioners' property, ultimately resulting in petitioners' filing for bankruptcy. (RX E:322-327); App., *infra,* A 6-7.

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[4] Previously considered to be the same as the Bee Creek Cave Harvestman, the Bone Cave Harvestman was listed as a separate "endangered" species on August 18, 1993. 58 Fed. Reg. 43818.

FWS used various means to achieve this end. FWS threatened Dr. Purcell with criminal prosecution for violation of the take provision. His alleged "crime" consisted of clearing brush and trash off of his property. App., *infra,* A 4. On numerous occasions spanning a decade, FWS prevented sales of various tracts of the petitioners' property by asserting that construction on the property would violate the ESA take provision. (RX E:327). Perhaps worst of all, when petitioners went to FWS to obtain §10a "incidental take" permits – permits which FWS had earlier assured Federal District Judge Sam Sparks would not even be necessary to develop certain large tracts of petitioners' property and which, otherwise, could be issued if sought – FWS deliberately refused to act on those permit applications. *GDF Realty, Ltd., et al. v. United States, et al.*, No. A 98 CA 772 SS, slip op. at 6 (W.D. Tex. June 7, 1999).

After petitioners filed their incidental take permit applications, they met with FWS officials numerous times with development proposals. (RX E:326-328). Each time, petitioners sought to satisfy FWS's concerns by scaling back their development plans. Always unsatisfied, FWS officials made increasingly onerous demands for additional "dedications" of petitioners' land culminating in a July 21, 1998, meeting with FWS official David Frederick in which Frederick produced a map of the 216 acres indicating that development was prohibited on all but a few meager, isolated tracts of land.[5] (RX E:327-328). In that same meeting, Frederick also announced that FWS would deny

[5] Frederick's map prohibited *any development whatsoever* on Tracts A, B, F & G. Development was also prohibited on a 40-acre portion of Tract C (74 acres total), and a 37.3-acre portion of Tract D (47 acres total), which FWS labeled on its map as the "NON-DEVELOPMENT AREA." According to the FWS map, limited development could go forward only on Tract E, a parcel consisting of steep canyons and which is inaccessible by road. (RX E:327-328).

all of the §10(a) permits. (RX E:328). Although it was now certain that FWS would not allow development (contrary to their earlier representation to Judge Sparks) by granting the §10(a) permits, FWS refused to formally deny the permit applications in writing, which would allow the petitioners to seek judicial relief. (RX E:328-329).

Petitioners made numerous unsuccessful attempts to get FWS to formally act on their permit applications. (RX E:328-329). With foreclosure looming, petitioners filed suit to force FWS to act on the applications. *GDF Realty, Ltd., et al. v. United States, et al.*, No. A 98 CA 772 SS (W.D. Tex. June 7, 1999). The district court held that the applications were de facto denied and condemned the FWS's "intentional dela[y]" in ruling upon them as "totally irresponsibl[e]." "To force the plaintiffs into economic damage by intentionally delaying a ruling on their applications, a ruling to which they are legally entitled, is *simply wrong*." *Id.* at 6 (emphasis added).

D. Petitioners' challenge to FWS' claimed jurisdiction over cave insect takes and the district court's ruling.

Unable to obtain permits, GDF filed this suit against the Secretary of Interior and Director of FWS. GDF sought a declaration that Congress, through its delegation to FWS, exceeded its authority under the Commerce Clause by asserting jurisdiction over the takes of intrastate, noncommercial cave insects.

The parties submitted the case on cross motions for summary judgment. Judge Sparks granted the government's motion and denied GDF's motion. App., *infra*, A 74. The district court held that the ESA take provision is valid under the "substantial effect on interstate commerce" category of congressional authority. *Id.*, A 61-71. In framing the "substantial effects" inquiry, the district court focused on GDF's proposed use of the property, rather than the activity actually regulated by the statute – takes

of the cave insects. *See, e.g., Id.*, A 61-65. "[I]t is obvious that the effect of building Wal-Marts and apartment complexes, in the aggregate, quite substantially affects interstate commerce." *Id.*, A 64.

E. The Fifth Circuit decision.

The Fifth Circuit affirmed on "wholly different reasoning." App., *infra*, A 77. It rejected the district court's focus on GDF's proposed use of the property, instead holding that the substantial effects inquiry must center on the regulated activity – cave insect takes. *Id.*, A 21. Observing that each of the three *Lopez* categories recognizes Congress' power to regulate "where the *object of regulation* relates to interstate commerce: channels, instrumentalities, or activities," *id.*, A 22 (emphasis in original), the court held that: "Neither the plain language of the Commerce Clause, nor judicial decisions construing it, suggest that, concerning substantial effect *vel non,* Congress may regulate activity (here, Cave Species takes) solely because non-regulated conduct (here, commercial development) by the actor engaged in the regulated activity will have some connection to interstate commerce." *Id.*, A 22. "In expanding its scope-inquiry to plaintiffs' commercial motivations," the court of appeals said the district court misread *Lopez, Morrison* and Fifth Circuit precedent. App., *infra*, A 23.

The court of appeals also rejected other arguments made by the government and adopted by other courts of appeals, including the Fourth Circuit in *Gibbs*. First, the government argued that evidence of scientific travel and publication "demonstrates the Cave Species 'play a role in interstate commerce.'" App., *infra*, A 28. FWS cited evidence that scientists interested in the cave insects have traveled to Texas to study them, some cave insects have been transported to and from museums in five states, and articles about cave insects have been published in scientific journals. *Id.* Rejecting the government's argument, the court of appeals held that "[t]o the extent FWS contends that the loss of the Cave Species would affect the

scientific travel or publication industries, it offers no evidence that it would substantially do so. In fact, the minimal evidence presented by FWS indicates such an effect would be negligible." and "far too attenuated to pass muster" under *Morrison*. *Id.*, A 28-29.

Second, the government argued that "future commercial benefits derived from the Cave Species will be significant enough to substantially affect interstate commerce." App., *infra*, A 29. The Fifth Circuit rejected this claim of future benefits as mere "conjecture." *Id.*, A 30. Moreover, the court found the *rationale* of Commerce Clause jurisdiction through speculative future benefits flawed because "[t]he *possibility* of future substantial effects of the Cave Species on interstate commerce, through industries such as medicine, is simply too hypothetical and attenuated from the regulation in question to pass constitutional muster." *Id.* (emphasis in original).

The court of appeals thus held that cave insect takes, considered alone, do not substantially affect interstate commerce. However, the court affirmed FWS's jurisdiction by aggregating *all takes of all endangered species* to locate a substantial effect on interstate commerce. App., *infra*, A 43. In so doing, the court of appeals employed a rationale at odds with other parts of its opinion and with this Court's opinions in *Lopez* and *Morrison*. Although the court of appeals earlier stated that "in a sense, Cave Species takes are neither economic nor commercial," for purposes of aggregation, it reversed field and found that the ESA take provision is economic and the ESA – a quintessential wildlife protection statute – is "an economic regulatory scheme." *Id.*, A 31. Applying this contradictory analysis, the court applied *Wickard*-style aggregation of all endangered species takes, *some* of which substantially affect interstate commerce, to uphold the take provision's application to the non-commercial cave insects. *Id.*, A 32-36.

F. The dissent from denial of rehearing en banc.

Six judges of the Fifth Circuit – almost half of the court's active members – dissented from the denial of rehearing en banc. Calling the case both "significant" and in conflict with this Court's Commerce Clause jurisprudence, Judge Edith Jones authored the dissent. Judge Jones' dissent contrasts the "generally excellent ... discussion" in the first part of the panel's opinion (which finds that cave insect takes, alone, do not substantially affect interstate commerce) (App., *infra*, A 84-85) with the "confusing and self-contradictory" discussion of aggregation – the panel's approval of which "would not only sustain every conceivable application of the ESA, but entirely undercuts *Lopez* and *Morrison*." *Id.*, A 80.

Judge Jones' dissent exposes the significant contradictions between the panel's willingness to aggregate cave species takes with all other takes to find the necessary commercial effect, where it had already found that "Cave Species takes are neither economic nor commercial;" that there is no present link between cave insect takes and commerce ("there is no historic trade in the Cave Species, nor do tourists come to Texas to view them"); and that any future link is unacceptable surmise ("[i]f the speculative future medical benefits from Cave Species makes their regulation commercial, then almost anything would be"). App., *infra*, A 83. The dissent observes that the panel's use of aggregation premised on the "interdependent web" of all species allows a "remote, speculative, attenuated, indeed more than improbable connection to interstate commerce" to supply the constitutional basis for regulation, thereby giving "these subterranean bugs federal protection that was denied the school children in *Lopez* and the rape victim in *Morrison*." App., *infra*, A 76. In so doing, the panel had allowed "Congress, for the first time in U.S. history ... to aggregate purely intrastate, non-economic activity," (App., *infra*, A 84) and had "trample[d] the precept" that "federal legislation under the Commerce

Clause must have a limiting principle so as not to obliterate the distinction between that which is truly national and that which is local." *Id.*, A 87.

REASONS FOR GRANTING THE PETITION

This Court should grant review because the Fifth Circuit's decision "entirely undercuts *Lopez* and *Morrison*" while sanctioning federalization of land use issues traditionally reserved to the States and their localities, and because the lower courts are in disarray as to the federal government's Commerce Clause authority to regulate takes of intrastate, non-commercial species – an issue of enormous practical importance to landowners and regulators throughout the country.

I. The Fifth Circuit decision conflicts with this Court's Commerce Clause jurisprudence in *Lopez* and *Morrison*.

Lopez identified three broad categories of activity that Congress has the authority to regulate pursuant to the commerce power: 1) The use of the channels of interstate commerce; 2) The instrumentalities of interstate commerce, or persons or things in interstate commerce; and 3) Those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce. *Lopez*, 514 U.S. 558-59. As the court of appeals recognized, the regulated activity here involves neither the channels of interstate commerce, nor instrumentalities or objects in interstate commerce. App., *infra*, A 10. Thus, it can only be sustained under the third category of commerce power.

In *Lopez* and *Morrison*, this Court identified four factors in analyzing the limits of the "substantial effects" test:

1. Whether the statutory provision, by its terms, regulates commercial or economic activity.

2. Whether the statutory provision contains a jurisdictional element which ensures that the regulated activity has an explicit connection with or effect on interstate commerce.
3. Whether the statutory provision is supported by express Congressional findings regarding the effects the regulated activity has upon interstate commerce.
4. Whether the link between the regulated activity and a substantial effect on interstate commerce is so attenuated as to leave no logical stopping point to the commerce power.

Faithful application of the four factors considered by this Court in finding the Gun-Free School Zones Act ("GFSZA") and Violence Against Women Act ("VAWA") outside the commerce power compels the same conclusion here – that regulating takes of local, non-commercial cave insects exceeds the commerce power.

A. The Fifth Circuit's aggregation analysis conflicts with this Court's recognition that only economic activity has heretofore been aggregated.

The first and most important factor in analyzing the limits of the commerce power is whether the regulated activity is commercial or economic in nature. As this Court pointed out in *Morrison*, "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." 529 U.S. at 613. It is thus dispositive that, as the Fifth Circuit found, "Cave Species takes are neither economic nor commercial. There is no market for them; any future market is conjecture." App., *infra*, A 31. Under the Commerce Clause, non-economic takes of the cave insects cannot be regulated by the federal government.

The Fifth Circuit panel avoided this result by aggregating non-economic takes of cave insects with all takes of

all endangered species, which produces (petitioners concede) a substantial effect on interstate commerce. This use of the aggregation principle – which would completely eliminate as-applied Commerce Clause challenges to ESA regulation, *see*, App., *infra*, A 80 (Jones dissent) – is impermissible. In *Lopez*, this court canvassed its Commerce Clause jurisprudence and concluded that in those cases in which the Court sustained the use of aggregation to arrive at substantial effects on interstate commerce, what was aggregated was commercial or economic activity. *See* 514 U.S. at 559-560 (discussing *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981) (coal mining); *Perez v. United States*, 402 U.S. 146 (1971) (credit transactions); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (restaurants); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (inns and hotels)). Never has this Court countenanced an expansive use of aggregation to reach entirely non-economic conduct.

Even *Wickard v. Filburn*, 317 U.S. 111 (1942) – which this Court has described as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity" (*Lopez*, 514 U.S. at 560) – focused not on the aggregate commercial effects of the *class* of activity to which regulated conduct belongs, but on the aggregate commercial effect of the *specific activities* at issue. This Court in *Wickard* did not uphold federal regulation of wheat produced for home consumption on the theory that agricultural production or transactions as a whole substantially affect commerce – which it easily could have done were the aggregation theory applied by the Fifth Circuit in this case a correct approach to Commerce Clause analysis. Instead, this Court in *Wickard* engaged in a particularized inquiry into the aggregate commercial effects of on-farm wheat production. It concluded, for example, that "a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions," and that even "assum[ing] that it is never marketed, it supplied a need of

the man who grew it which would otherwise be reflected by purchases on the open market," so that home-grown wheat "in this sense competes with wheat in commerce." 317 U.S. at 128. The Court would hardly have engaged in this more burdensome inquiry were the Commerce Clause question simply whether agricultural production or transactions in general substantially affected commerce. As this Court confirmed in *Morrison*, in *Wickard* and every one of its progeny in which federal regulation has been sustained by this Court, "the regulated activity was of an apparent commercial character." 529 U.S. at 611.

Nevertheless, the Fifth Circuit panel upheld the use of aggregation based on its conclusion that the ESA is "an economic regulatory scheme" of which "the regulation of interstate takes of the Cave Species is an essential part." App., *infra*, A 36. The panel's conclusion is based on three rationales, none of which withstand scrutiny.

First, the Fifth Circuit cited ESA legislative history regarding the "'incalculable' value of the genetic heritage that might be lost absent regulation" and imported legislative history from a precursor of the ESA[6] regarding the commercial value that might be derived in the future from controlled exploitation of species. App., *infra*, A 32-33. The flaw in the court's reliance on speculative commercial benefits from endangered species is well stated elsewhere in the court's opinion: "This contention, whatever its merits may ultimately be, runs afoul of the attenuation consideration. The *possibility* of future substantial effects of the Cave Species on interstate commerce, through industries such as medicine, is simply too hypothetical and attenuated from the regulation in question to pass constitutional muster." *Id.*, A 30 (citing *Morrison*, 529 U.S. at

[6] In *Lopez*, this Court noted that the importation of legislative history from previous enactments is inappropriate. 514 U.S. at 563.

612) (emphasis in original). If all that is required to show that a statute is "economic" – thereby allowing aggregation – is a belief that a statute may have some speculative future benefit to commerce, then there is no stopping point to the commerce power.

Second, the court reasoned that the "majority of takes would result from economic activity." App., *infra*, A 33. However, as the court correctly pointed out elsewhere, economic activity causing the takes is not the subject of the regulation (*id.*, A 23):

> [T]he district court in this case looked primarily beyond the regulated conduct – Cave Species takes – in order to assess effect on interstate commerce. It looked to plaintiffs' planned commercial development of the property where the takes would occur. True, the *effect* of regulation of ESA takes may be to prohibit such development in some circumstances. ***But, Congress, through ESA, is not directly regulating commercial development.*** (emphasis added).

Third, the court observed that the ESA is "truly national" in scope. App., *infra*, A 34. This rationale fails because simply identifying a problem and stating that it is national in scope does not convert a statute regulating that problem into a commercial regulation. If that were the case, then the "national problems" addressed by the GFSZA and VAWA would have passed Commerce Clause muster. The Commerce Clause permits the federal government to regulate matters that substantially affect interstate commerce, not all "national" problems regardless of their connection to commerce.

A fair reading of the ESA as a whole indicates that it is not a scheme of commercial regulation – it is a statutory scheme designed to protect endangered wildlife, some of which has substantial effects on interstate commerce and much of which crosses state lines. The ESA provides a process for listing endangered species and identifying their

critical habitat, 16 U.S.C. §1533; provides authority to Federal agencies to protect listed species by purchasing land for preserves, 16 U.S.C. §1534; and directs all Federal agencies to consult with FWS to determine whether an agency action will "jeopardize the continued existence of any endangered species . . . or result in the destruction or adverse modification of [critical] habitat." 16 U.S.C. §1536; *see also Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978). The ESA also sets up a system of coordination with state and foreign governments to provide funding and collaboration to conserve listed species. 16 U.S.C. §§1535 & 1537. Finally, the ESA prohibits certain acts, including taking a listed species, 16 U.S.C. §1538, while providing for permitting and enforcement. 16 U.S.C. §§1539 & 1540.

These provisions are valid regulations under various federal powers (*e.g.*, spending, property) and under the Commerce Clause may certainly be applied to species that are economic or interstate. But what is absent from the ESA is an overall scheme to regulate a commercial market. The ESA stands in sharp contrast to the regulation of congressionally-defined commercial markets for wheat (*Wickard*), surface coal mining (*Hodel*), credit transactions (*Perez*), restaurants (*Katzenbach*), and inns & hotels (*Heart of Atlanta*), to name just a few. Absent such a congressionally-defined commercial market, this Court has *never* sustained the use of aggregation. This case presents no reason to depart from this Court's limitations on the aggregation principle such that, "Congress, for the first time in U.S. history, is authorized to aggregate purely intrastate, non-economic activity." App., *infra*, A 84.

B. The take provision lacks a jurisdictional element to contain it within constitutional bounds.

The second factor emphasized by this Court in *Lopez* and *Morrision* in holding the GFSZA and VAWA to be beyond the commerce power was the lack of an "express jurisdictional element" to "insure, through case by case

inquiry, that the [regulated activity] affects interstate commerce." *Lopez*, 514 U.S. at 562. In stark contrast to other provisions in Section 9 of the ESA,[7] the take provision lacks any jurisdictional element that narrows its application to constitutional limits. Had the provision contained language limiting its reach to conduct with a substantial effect on interstate commerce, it would not have applied to takes of the cave insects, for as the Fifth Circuit held, those species by themselves have "no commercial market" (App., *infra*, A 4) and their "takes are neither economic nor commercial." App, *infra*, A 31. It would be ironic if regulation that could not pass muster under an express jurisdictional element could survive Commerce Clause scrutiny where such an element was omitted. *Cf. Jones v. United States*, 529 U.S. 848, (2000) (construing jurisdictional element of arson statute narrowly to avoid constitutional problems created by extending commerce power to attenuated connections to commerce – *e.g.*, out of state natural gas, insurance and financing).

C. The ESA and its take provision are not supported by findings regarding "substantial effect on interstate commerce."

When Congress enacted the ESA in 1973, it made no express findings regarding the effect (substantial or otherwise) that takes of endangered species have on interstate commerce, nor did it make any such findings for the ESA generally. *See* 16 U.S.C. §1531(a) (setting forth

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[7] Section 9(a)(1)(E) of the ESA, 16 U.S.C. §1538(a)(1)(E), makes it unlawful to "deliver, receive, carry, transport, or ship in interstate or foreign commerce" and "in the course of a commercial activity" any listed species. Sections 9(a)(1)(F) and 9(a)(2)(C) & (D) also contain express "interstate or foreign commerce" jurisdictional elements. 16 U.S.C. §1538(a)(1)(F), (a)(2)(C),(D).

the findings made by Congress when it enacted the ESA, none of which address substantial effect on interstate commerce). Thus, the ESA is not a statute in which Congress declared that "the entire class of [regulated] activities affects commerce." *Maryland v. Wirtz*, 392 U.S. 183, 192 (1968). *Compare* Surface Mining Control and Reclamation Act, 30 U.S.C. §1201, upheld in *Hodel v. Virginia Surface Mining & Reclam. Assn.*, 452 U.S. 276-81 (1981). Similarly, the ESA's legislative history provides no evidence regarding the effect that takes of endangered species have on interstate commerce. *See* 1973 U.S.C.C.A.N. 2989. Obviously, therefore, Congress also made no findings that takes of intrastate species that are not traded in commerce and have no economic value nevertheless substantially affect interstate commerce.

Where there are no congressional findings, the courts must scrutinize carefully the constitutional sufficiency of the nexus to interstate commerce, and as to the cave insects, as the court below acknowledges, there is none.

D. The Fifth Circuit's analysis provides no logical stopping point to the commerce power.

The Fifth Circuit's analysis of the commerce power is further in conflict with *Lopez* and *Morrison* because it provides no logical limits on that power. The court's boundless holding is premised on the idea that takes of the cave insects threaten the "interdependent web of all species" which threatens "the ecosystems upon which we and other species depend." App., *infra*, A 35. The flaws in this approach are well stated in Judge Jones' dissent: "[T]his is no more than the 'but-for-causal chain' approach twice rejected by the Supreme Court in *Lopez* and *Morrison*. . . . An even more obvious dissonance between the panel opinion and *Lopez*, *Morrison* and the Constitution is that the Commerce Clause regulates commerce, not ecosystems." *Id.*, A 86.

Although the Fifth Circuit acknowledged this Court's concern that Commerce Clause rationales have some limiting principle so as not to obliterate the distinction between that which is truly national and that which is local, the court's conclusion "tramples that precept." App., *infra*, A 87. The court's conclusory statement that its "interdependent web" approach "will not allow Congress to regulate land use or wildlife preservation" ignores the practical reality that federal jurisdiction over local endangered species permits the FWS to act as a federal land use authority. *Id.*, A 36 (citing *Morrison*, 529 U.S. at 612-13). As Judge Jones correctly points out, "Once the FWS designates a species as endangered, the Government has functional control over the land designated as its habitat. If such authority is not justified by a federal interest in regulating interstate commerce, it 'would result in a significant impingement of the States' traditional and primary power over land and water use.' *Solid Waste Agency,* 531 U.S. at 173-74." App., *infra*, A 87.

Moreover, federal jurisdiction over harm to cave insects through attenuated connections to commerce (*i.e.*, *other species*' connections with commerce) simply cannot be squared with this Court's attenuation analysis in *Lopez* and *Morrison*. *See also Gulf Oil Co. v. Copp Paving Co.*, 419 U.S. 186, 198 (1974) (a "chain of causation" that "ha[d] no logical endpoint" resulted in "nebulous" jurisdictional limits and no acceptable "nexus" to commerce); *FERC v. Mississippi*, 456 U.S. 742, 758 n.23 (1982) (Congress may not "regulate in an area that is only tangentially related to commerce"). As the six dissenting judges of the Fifth Circuit pointedly observe: "Chief Justice Marshall stated in *Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264, 5 L.Ed. 257 (1821), that Congress has no general right to punish murder or felonies generally. Surely, though, there is more force to an 'interdependence' analysis concerning humans, and thus a more obvious series of links to interstate commerce, than there is to 'species.' Yet the panel's 'interdependent web' analysis of the Endangered Species Act gives these subterranean bugs federal protection that was

denied the school children in *Lopez* and the rape victim in *Morrison.*" App., *infra*, A 76.

The Fifth Circuit's decision upholding FWS's authority to regulate intrastate, non-commercial cave insects is in conflict with *Lopez* and *Morrison*. Applied more generally, the Fifth Circuit's reasoning would eliminate all Commerce Clause limits on federal power. This Court's intervention is urgently required.

II. The courts of appeals are in disarray regarding the scope of Commerce Clause authority to regulate takes of intrastate, non-economic species.

The uneven trajectory of this case reflects the lower courts' complete disarray regarding the scope of the federal government's Commerce Clause authority to regulate takes of intrastate, non-economic species. Just as in this case, courts nationwide disagree as to the scope of activity that can be considered for determining substantial commercial effect. Some courts look only to the activity – species takes – expressly regulated by the terms of the statute. Other courts, however, focus on the motivation of the actor or the collateral effects of the regulation itself on development, tourism, and scientific study.

Due in part to this disagreement over the scope inquiry, courts have split on whether the activity regulated by the take provision is economic. This split has significant implications for aggregation. If a court determines that the species take is economic, aggregation can be used to uphold Commerce Clause authority. If the regulated activity is not economic, lower courts have further disagreed as to whether non-economic activity can be aggregated. This wide-ranging disagreement between the lower courts has resulted in a bewildering range of rationales that are confusing and contradictory.

These disagreements are not mere theoretical concerns. Because of the ESA's deep intrusion into the ordinary lives of landowners, the implications of this disagreement take on a very real dimension. Landowners undertaking everyday activities on their property – activities such as grazing,[8] irrigating crops,[9] or even building a fence[10] – face potential imprisonment for violation of the take provision. One need look no further than this case for an example. FWS threatened Fred Purcell with *criminal* prosecution under the ESA for simply clearing trash and brush off of his property. App., *infra*, A 4. This issue – and this case – cry out for the Court to step in and bring clarity and certainty to the scope of FWS' authority and a landowner's potential criminal and civil liability for everyday activities that may inadvertently harm endangered species or merely modify their habitat.

A. The courts disagree as to what activity should be considered for determining substantial effect.

In analyzing the limits of Commerce Clause authority, the initial inquiry centers on what activity a court can consider for the "substantial effects" test. The courts of appeals are deeply divided on this issue, employing different, mutually exclusive rationales.

1. The disagreements in this case highlight the contradictory reasoning used by courts on this issue.

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[8] *See, e.g., Palila v. Hawaii Dep't of Land & Nat'l Res.*, 639 F.2d 495 (9th Cir. 1981).

[9] *See, e.g., U.S. v. Glenn-Colusa Irrigation Dist.*, 788 F. Supp. 1126 (E.D. Cal. 1992) (irrigation district enjoined from pumping water through intake pipes causing take of endangered species).

[10] *Rancho Viejo*, 323 F.3d at 1065 (building fence modifies habitat of arroyo toad causing take under §9).

Although the regulatory provision at issue prohibits takes of endangered species, the district court below expanded the scope inquiry beyond the effect of cave insect takes on interstate commerce. Instead, it looked to GDF's proposed use of the property to locate a nexus with interstate commerce. Thus, in a case regarding take of endangered cave insects, the district court thought it proper to consider the proposed construction of a Wal-Mart for determining substantial effect. "Plaintiffs mistakenly focus only on the commercial aspects (or, in their view, the complete lack thereof) of the Cave Species. However, the activity regulated in this case is not simply the Cave Species. It is an alleged take of the Cave Species through plaintiffs' development of the Property. Plaintiffs cannot simply ignore the commercial nature of their activity." App., *infra*, A 62.

Citing this Court's opinion in *SWANCC*, 531 U.S. at 173, the Fifth Circuit expressly rejected the district court's expanded scope inquiry, holding that a reviewing court must look at the activity regulated by the express terms of the provision in question. Thus, because building a Wal-Mart (and regulation of commercial development generally) is not within the express terms of the regulated activity, the Fifth Circuit focused directly on the effect of cave insect takes and held that they were neither economic nor commercial. App., *infra*, A 21-27.

2. The circuits are split on this issue. The Fifth Circuit's reasoning in this case is flatly at odds with the D.C. Circuit's recent decision in *Rancho Viejo v. Norton*. Just as the district court in this case focused on building a Wal-Mart instead of cave insect takes, the D.C. Circuit adopted its own version of the "Wal-Mart rationale" to uphold the take provision's application to the arroyo toad – an intrastate, non-economic endangered toad. The D.C. Circuit expanded "the regulated activity" to include actions and motivations outside the express terms of the take provision. *Rancho Viejo,* 323 F.3d at 1072-73. Specifically, the D.C. Circuit held that "the regulated activity is

[Rancho Viejo's] construction of a 202 acre commercial housing development." *Id.* at 1068.

By expanding the "substantial effects" inquiry beyond the express terms of the take provision, the D.C. Circuit held that takes of the arroyo toad substantially affect interstate commerce: "To survive Commerce Clause review, all the government must establish is that 'a rational basis exist[s] for concluding that a regulated activity sufficiently affect[s] interstate commerce.' [] And there can be no doubt that such a relationship exists for costly commercial developments like Rancho Viejo's." *Id.* at 1070 (citation omitted). *Rancho Viejo's* holding reaffirmed the D.C. Circuit's earlier opinion in *NAHB v. Babbitt*, 130 F.3d 1041. In *NAHB*, the D.C. Circuit held that harm caused to habitat of an intrastate insect (the Delhi Sands Flower-loving Fly) by construction of a hospital and freeway and related use of building materials was a sufficient connection with interstate commerce. *Id.*, 130 F.3d at 1056 (Wald, J); *id.* at 1059 (Henderson, J., concurring); *see also Gibbs v. Babbitt*, 214 F.3d 483, 495, 497 (4th Cir. 2000) (finding a connection with interstate commerce through the commercial motivations of farmers and others).

Every post-*Lopez* case analyzing the limits of Commerce Clause power to regulate takes of intrastate, non-economic species has resulted in sharply divided courts of appeals, with opinions based on inconsistent and contradictory rationales, over the strong dissents of some of the nation's most distinguished jurists. In *NAHB,* a plurality of the court upheld the application of the take provision to an intrastate, non-commercial species, but the majority were unable to agree on a rationale. The various rationales offered by the plurality and their conflict with *Lopez* drew a strong dissent from Judge Sentelle, who found it "unsurprising" that the plurality could not agree on a rationale because "this effort to regulate does not fit any of [the three *Lopez*] categories" of commerce authority. *NAHB*, 130 F.3d at 1062.

Rancho Viejo's post-*Morrison* reaffirmation of *NAHB* caused Judge Sentelle to dissent again, noting that the decision "broadens" the "divergence" between *NAHB* and *Lopez* and *Morrison* as well as being "conspicuously in conflict" with the Fifth Circuit's decision in *GDF*. *Rancho Viejo*, 334 F.3d 1158 (D.C. Cir. 2003) (dissenting from denial of reh'g en banc). Judge Roberts would have reheard the case en banc as well, noting the inconsistency between the panel's broad substantial effects analysis ("whether the challenged *regulation* substantially affects interstate commerce, rather than whether the *activity* being regulated does so") and *Lopez* and *Morrison* as well as "the conflict[] with the opinion of a sister circuit [in *GDF*]." *Id.* (emphasis in original). In *Gibbs*, the Fourth Circuit split 2-1 over the vigorous dissent of Judge Luttig, who found the majority's analysis so far out of step with *Lopez* and *Morrison* that it is "not even arguably sustainable." 214 F.3d at 507.

The reasoning split between the Fifth Circuit in *GDF Realty* and the D.C. Circuit in *Rancho Viejo* (as well as *NAHB* and the Fourth Circuit in *Gibbs*) is clearly cast because the courts reach diametrically opposed positions on the same issue. *GDF* holds that commercial development activity causing takes of endangered species does not count for the purposes of determining substantial effect; *Rancho Viejo* holds that it does.

The reasoning split creates a split in results as well. Thus, although *GDF Realty* and *Rancho Viejo* involved similar Commerce Clause challenges (application of the ESA take provision to intrastate, non-commercial species), they reach different results on whether takes of those species, considered alone, substantially affect interstate commerce. *GDF* holds that cave insect takes alone do not substantially affect interstate commerce; *Rancho Viejo*

holds that they do.[11] The different results reached by the circuits are *solely* attributable to the reasoning employed by the courts. They can in no way be attributed to differences in evidence regarding these species.

Finally, the divergent rationales create different constitutional standards between the circuits. The broad "Wal-Mart rationale" used by the district court below and the D.C. Circuit "would allow application of otherwise unconstitutional statutes to commercial actors, but not to non-commercial actors" which would eviscerate any limits on Congress' authority to "regulate intrastate activities, so long as those subjected to the regulation were entities which had an otherwise substantial connection to interstate commerce." App., *infra*, A 23. Conversely, the Fifth Circuit's expansive aggregation rationale prevents "as-applied" challenges when the take provision reaches "too far." App., *infra*, A 88-89. Thus, "the lone hiker in the woods, or the homeowner who moves dirt in order to landscape his property, though he takes [the endangered species]" is liable for take in the Fifth Circuit, but not the D.C. Circuit, even though the action "does not affect interstate commerce." *Rancho Viejo*, 323 F.3d at 1080 (Ginsburg, J., concurring).

The reasoning split between the circuits in this critical component of Commerce Clause analysis – determining what activity or conduct "counts" for the purposes of substantial effect – is clearly cast in the courts' respective decisions, is substantial in scope because of its often case-dispositive nature and is, therefore, ripe for resolution by this Court.

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[11] The Fifth Circuit decision upholding the take provision's application to non-commercial cave insects is solely premised on aggregation of all takes of all endangered species. App., *infra*, A 34.

B. The courts of appeals disagree whether non-economic activity can be aggregated.

The second issue on which the courts of appeals are in disarray is whether non-economic activity can be aggregated. The conflicting rationales in this case again serve as a good example. Relying on *NAHB* and *Gibbs*, the district court below used an expanded scope inquiry (*e.g.*, building a Wal-Mart on petitioners' property) to find the regulated activity "economic" and allowed aggregation. App., *infra*, A 61-64. The Fifth Circuit panel, by contrast, found cave insect takes non-economic standing alone, but allowed aggregation on the ground that such takes are an essential part of an "economic" regulatory statute. *Id.*, A 28-36. The six dissenting judges disagreed, noting that this Court has only sustained Commerce Clause regulation under the aggregation principle when "the regulated activity was of an apparent commercial character." *Morrison*, 529 U.S. at 611; *see* Part I.A., *supra*. The dissent also pointed out the panel's logical dissonance: "The panel attempts to convert the ESA to an economic regulatory statute by opining that the majority of species takes would result from economic activity, and 'the Cave Species takes would occur as a result of plaintiffs' planned commercial development.'" App., *infra*, A 85. Yet as the dissent notes, the panel had "rejected this argument earlier, when it found that the regulated activity is the take, not the planned commercial land development." *Id.*

This dissonance regarding aggregation of non-economic activity is evident elsewhere. In *NAHB*, Judge Wald, writing for the plurality, accurately conceded that the regulated activity is, "local and is not regarded as commerce." *NAHB*, 130 F.3d at 1049, fn.7 (internal citation omitted).[12] Nevertheless, she applied aggregation to

[12] *See also, NAHB*, 130 F.3d at 1064 (Sentelle, J., dissenting) (take provision applied to intrastate fly "does not control a commercial

(Continued on following page)

permit regulation of intrastate, non-economic species. 130 F.3d at 1049. Judge Sentelle disagreed in dissent, offering a persuasive explanation of why *Wickard* does not support aggregation here. *Id.* at 1066-67. In her concurrence, Judge Henderson did not expressly take a position regarding Judge Wald's aggregation rationale. Yet she reached the same result by relying on the ESA's protection of "biodiversity" and the "interconnectedness of species and ecosystems." *Id.* at 1058-59. The uncertain scope of this alternative "biodiversity" approach, which the D.C. Circuit declined to apply in *Rancho Viejo*, 323 F.3d at 1067, only exacerbates the confusion over what limits apply (if any) to federal power over intrastate, non-economic species.[13]

The Fifth Circuit's expansive aggregation rationale creates additional conflict by stripping away limits on the commerce power that even the D.C. Circuit approaches preserve. As Judge Jones' dissent states, the panel's rationale forecloses "as-applied" challenges when the take provision reaches "too far." App., *infra*, A 88-89.

The divergent aggregation rationales in ESA cases are evident elsewhere. Outside the context of the ESA, other courts of appeals have differed on how to apply *Wickard* and whether non-economic activity can be aggregated.[14]

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activity, or an activity necessary to the regulation of some commercial activity. Neither killing flies nor controlling weeds nor digging holes is either inherently or fundamentally commercial in any sense.")

[13] *See also*, *Gibbs*, 214 F.3d at 493 (applying aggregation to uphold FWS regulation based on economic nature of ESA as measured by potential effects on tourism, agriculture and historic trade in red wolf pelts – none of which were the subject of the challenged regulation).

[14] *Compare: U.S. v. McCoy*, 323 F.3d 1114 (9th Cir. 2003) (rejecting aggregation of intrastate possession of child pornography) with *U.S. v. Rodia*, 194 F.3d 465 (3rd Cir. 1999) (reaching opposite conclusion); *U.S. v. Stewart*, 348 F.3d 1132 (9th Cir. 2003) (rejecting aggregation in case involving intrastate possession of homemade machine gun) with *U.S. v. Kenney*, 91 F.3d 884 (7th Cir. 1996) (reaching opposite conclusion); *Raich v. Ashcroft*, 352 F.3d 1222 (9th Cir. 2003) (rejecting aggregation

(Continued on following page)

Given this division over whether and (if so) to what extent non-economic activity can be aggregated, this Court's guidance is urgently required.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 2004

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of intrastate possession of medical marijuana) with *Proyect v. U.S.*, 101 F.3d 11 (2nd Cir. 1996) (reaching opposite conclusion).

326 F.3d 622

United States Court of Appeals,
Fifth Circuit.

GDF REALTY INVESTMENTS, LTD.;
Parke Properties I, L.P.; Parke Properties II, L.P.,
Plaintiffs-Appellants,

v.

Gale A. NORTON, Secretary, U.S. Department of the Interior; Marshall P. Jones, Director U.S. Fish and Wildlife Service, Defendants-Appellees.

No. 01-51099.

March 26, 2003.

Appeal from the United States District Court for the Western District of Texas.

Before DAVIS, BARKSDALE and DENNIS, Circuit Judges.

RHESA HAWKINS BARKSDALE, Circuit Judge:

The Endangered Species Act of 1973, 16 U.S.C. § 1531, *et seq.* (ESA), contains a "take" provision, 16 U.S.C. § 1538(a)(1)(B). For this challenge to Congress' Commerce Clause power, U.S. Const. art. I, § 8, cl. 3, at issue is whether ESA's take provision is unconstitutional *as applied* to six species of subterranean invertebrates found only within two counties in Texas (Cave Species). Central to this question is whether, to demonstrate the requisite substantial effect on interstate commerce, Cave Species "takes" may be aggregated with those of all other endangered species. They can be; the judgment is AFFIRMED.

I.

In 1983, Dr. Fred Purcell and his brother purchased an interest in 216 acres in Travis County, Texas, near the City of Austin (the property). The property (lying within approximately 1,200 acres known as the Parke) consists of seven tracts in which the Purcells, as the limited partners in Parke Properties I, L.P., and Parke Properties II, L.P., hold a 70 percent interest. GDF Realty Investments, Ltd., holds the remaining interest in the property. It is located at the intersection of two major highways in what is, commercially and residentially, a rapidly growing area.

The property is part of the Jollyville Plateau and is characterized by karst topography, in which water percolating through limestone rock creates caves, sinkholes, and canyons. The property contains a number of caves, including Tooth, Kretschmarr, Root, Gallifer, and Amber, as well as a collection of caves known as the Cave Cluster.

Since acquiring the property, the Purcells and their partners (Purcells) have attempted to develop it commercially, including the installation of water and wastewater gravity lines, force mains, lift stations, and other utilities. These improvements have been dedicated to the City of Austin; a right-of-way, to Travis County.

In 1988, the United States Fish and Wildlife Service (FWS), an agency under the auspices of the Department of the Interior, issued a Rule listing five subterranean invertebrate species as endangered under § 4 of ESA, 16 U.S.C. § 1533(a)(1). 53 Fed. Reg. 36,029 (16 Sept. 1988). A sixth species was similarly listed in 1993. 58 Fed. Reg. 43,818 (18 Aug. 1993). These six species are found on the property; they are the Bee Creek Cave Harvestman, the Bone Creek Harvestman, the Tooth Cave Pseudoscorpion,

the Tooth Cave Spider, the Tooth Cave Ground Beetle and the Kretschmarr Cave Mold Beetle. The Rules were issued in order to protect the Cave Species from increasing dangers, primarily new development. 16 U.S.C. § 1531(a)(1); 53 Fed. Reg. 36,029.

The Bee Creek Cave Harvestman, the Bone Creek Harvestman, and the Tooth Cave Pseudoscorpion are subterranean, eyeless arachnids (arthropods bearing four pairs of legs and no antennae); they range in size from 1.4 to 4 mm. The Tooth Cave Spider, a subterranean arachnid with eyes, measures 1.6 mm in length. The Tooth Cave Ground Beetle and the Kretschmarr Cave Mold Beetle are subterranean insects, the latter being eyeless; they vary in size from 3 to 8 mm.

The Cave Species were listed as endangered for a number of reasons. First, as noted, they were primarily being threatened with "potential loss of habitat owing to ongoing development activities". 53 Fed. Reg. 36,031. Second, no state or federal laws were in place to protect them or their habitat. *Id.* at 36,031-32. Finally: "[The Cave Species] require the maximum possible protection provided by [ESA] because their extremely small, vulnerable, and limited habitats are within an area that can be expected to experience continued pressures from economic and population growth". *Id.* at 36,032.

Pursuant to § 9(a)(1) of ESA, 16 U.S.C. § 1538(a)(1)(B), it is unlawful to "take" a member of a species listed as endangered. ESA defines "take" as to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect. . . . " 16 U.S.C. § 1532(19). Pursuant to authority given it by § 4(d) of ESA, 16 U.S.C. § 1533(d), FWS has defined "harm" to include significant modifications or degradations of a

habitat which kill or injure protected wildlife "by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering". 50 C.F.R. § 17.3.

The Cave Species are found only in underground portions of Travis and Williamson Counties, Texas. There is no commercial market for the Cave Species. At least 14 scientific articles concerning the Cave Species have been published in journals or other publications by 15 scientists. Some of them have visited Texas in order to study the Cave Species. For this research, members of the Cave Species have been transported to and from museums in New York, California, Pennsylvania, Illinois, and Kentucky.

In 1989, FWS notified the Purcells that their development plans might constitute a Cave Species take. In 1990, in an effort to alleviate FWS' concerns, the Purcells deeded approximately six acres of the property to Texas Systems of Natural Laboratories, Inc., a non-profit environmental organization. The gifted acres included various caves and sinkholes in which the Cave Species were known to live. The Purcells also constructed gates covering the most ecologically sensitive caves. These acts conformed to recommendations made by an expert on the Cave Species.

In 1991, the Purcells contracted to sell a portion of the property. Because FWS refused to state, however, that future development would not constitute a take, the agreement fell through. After clearing brush from the property in 1993, Dr. Purcell was advised by FWS that he was under federal criminal investigation for possible endangered species takes.

Subsequent to these incidents, the Parke's owners (including plaintiffs) filed in federal court for a declaratory judgment that development of the Parke would not constitute an endangered species take *Four Points Util. Joint Venture v. United States*, No. 93-CA-655 (W.D.Tex.1993). The district court ordered FWS to conduct an environmental review of the Parke.

In a 1994 letter summarizing that review, FWS notified the Parke's owners that the proposed development would likely constitute a take of the Cave Species, as well as of two bird species (golden-cheeked warbler and black-capped vireo). FWS' letter also noted that the Purcells' property within the Parke "could be developed without causing a take if development, among other things, [was] scaled back from the canyons, and surface and subsurface drainage and nutrient exchange [was] provided for".

The district court dismissed the action in September 1994. It ruled that FWS had to first determine whether a take had occurred; as FWS' letter indicated, it had not made that determination.

In 1997, the Purcells attempted to obtain ESA § 10(a) incidental take permits. *See* 16 U.S.C. § 1539(a). These permits allow takes of endangered species under certain circumstances, as listed in 16 U.S.C. § 1539(a)(2)(B).

The Purcells first sought the permit from the Balcones Canyonlands Conservation Plan, a regional body from which landowners obtain § 10(a) permits to develop protected land by paying "mitigation fees". It refused the application, however, because the relevant land was entirely within a protected area.

The Purcells next applied to FWS for the permit. *See* 16 U.S.C. 1539(a)(1). Their applications stated they planned to develop a shopping center (including a Wal-Mart), a residential subdivision, and office buildings (commercial development). FWS decided that the deeded preserves were inadequate to protect the Cave Species. As a result, the Purcells were unable to contract for the purchase and development of the property.

In July 1998, FWS advised the Purcells that the permits would be denied, but did not issue the denials. This effectively prevented the Purcells from challenging FWS' action.

Therefore, the Purcells filed suit in federal court, seeking a declaration that the permits had been denied *de facto. GDF Realty, Ltd. v. United States*, No. 98-CV-772 (W.D.Tex.1998). FWS then issued a formal statement, denying the permits based on its conclusion that, *inter alia,* Cave Species takes would occur if development were allowed. The district court ruled the permits had been denied. It also admonished FWS for delaying the denials when it had never intended to grant the permits.

In 1999, plaintiffs filed two actions in federal court. In the instant Commerce Clause action, they claim that, pursuant to *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), amplified post-filing of this action by *United States v. Morrison,* 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000), the ESA take provision, as applied to the Cave Species, is unconstitutional. (The second action, in the Court of Claims, No. 99-CV-513 (Fed.Cl.1999), claims an unconstitutional taking under the Fifth Amendment. It has been stayed pending this action.) In 2000, Parke Properties I, L.P., and GDF

Realty Investments, Ltd., filed for bankruptcy under Chapter 11. *In re Parke Properties I, L.P.*, No. 00-12587FM (Bankr.W.D.Tex.2000); *In re GDF Realty Investments, Ltd.*, No. 00-12588FM (Bankr.W.D.Tex.2000).

For this action, the parties agreed there are no factual disputes. Therefore, they filed cross-motions for summary judgment. In 2001, the district court granted summary judgment to defendants (FWS), holding the take provision constitutional under the Commerce Clause. *GDF Realty Investments, Ltd. v. Norton*, 169 F.Supp.2d 648 (W.D.Tex.2001). The district court analyzed the application of the take provision in the light of plaintiffs' proposed property development. Being "hard-pressed to find a more direct link to interstate commerce than a Wal-Mart [(as noted, one was to be located on the property)]", *id.* at 662, the court held the take provision's incorporation of the Cave Species, as applied to plaintiffs, was substantially related to interstate commerce, *id.* at 664.

II.

A summary judgment, reviewed *de novo*, *e.g.*, *Horton v. City of Houston*, 179 F.3d 188, 191 (5th Cir.), *cert. denied*, 528 U.S. 1021, 120 S.Ct. 530, 145 L.Ed.2d 411 (1999), is proper if "there is no genuine issue as to any material fact and . . . the [movant] is entitled to a judgment as a matter of law". Fed.R.Civ.P. 56(c). *E.g.*, *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Because there are no material fact issues, the only question is the constitutionality vel non of the take provision as applied to the Cave Species and pursuant to the power granted Congress under the Commerce Clause. U.S. Const. art. I, § 8, cl. 3.

"In reviewing an act of Congress passed under its Commerce Clause authority, we apply the rational basis test as interpreted by the *Lopez* court." *Groome Resources, Ltd. v. Parish of Jefferson,* 234 F.3d 192, 203 (5th Cir.2000). In other words: "Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a *plain showing* that Congress has exceeded its constitutional bounds". *Morrison*, 529 U.S. at 607, 120 S.Ct. 1740 (emphasis added).

Recently, our court extensively discussed the history of the Commerce Clause and the earlier noted landmark *Lopez* and *Morrison* decisions relied upon by plaintiffs. *United States v. Ho*, 311 F.3d 589 (5th Cir.2002). We need only briefly revisit that discussion.

Ho concerned using less expensive procedures for removal and disposal of asbestos than necessary to comply with, *inter alia,* 42 U.S.C. §§ 7412(h) and 7414(a) of the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, and implementing regulations, 40 C.F.R. § 61.145. Ho claimed these statutes and regulations, as applied to him, violated the Commerce Clause. Our court held the sections of the Clean Air Act were constitutional exercises of Congress' power to regulate interstate commerce. *Ho*, 311 F.3d at 603-04. In doing so, our court described "first principles" of commerce clause jurisprudence. *Id.* at 596-601. No authority need be cited for the fundamental and well-known limitation on the power of our Federal Government: the Constitution grants it limited and enumerated powers; those powers not so granted the Federal Government are retained by the States.

This division of powers was thought necessary "to ensure protection of our fundamental liberties". *Id.* at 596 (quoting *Lopez,* 514 U.S. at 552, 115 S.Ct. 1624 (internal citation omitted)). Justice Kennedy summarized this point in his *Lopez* concurrence:

> Though on the surface the idea may seem counterintuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one. "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself."

514 U.S. at 576, 115 S.Ct. 1624 (Kennedy, J., concurring) (quoting THE FEDERALIST NO. 51, at 323 (James Madison) (C. Rossiter ed., 1961)). In keeping with the subject at hand, the strength of this governmental system is aptly described by Kipling: "For the strength of the pack is the wolf and the strength of the wolf is the pack". RUDYARD KIPLING, THE SECOND JUNGLE BOOK, The Law of the Jungle 189 (Penguin Books 1987) (1895).

As noted, one of the Federal Government's enumerated powers is "to regulate Commerce . . . among the several States . . . " (interstate commerce). U.S. Const. art. I, § 8, cl. 3. Since *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937), "Congress has had considerably greater latitude in regulating conduct and transactions under the Commerce Clause" than it had previously been afforded. *Morrison,* 529 U.S. at 608,

120 S.Ct. 1740. On the other hand, *our constitutional* structure mandates a distinction between "what is truly national and what is truly local". *Id.* at 617-18, 120 S.Ct. 1740; *Lopez,* 514 U.S. at 567-68, 115 S.Ct. 1624.

The Court's fairly recent decisions in *Morrison* and *Lopez* have defined the outer limits of Commerce Clause power. *Lopez* described three categories of activity which Congress may regulate under it: "the use of the channels of interstate commerce"; "the instrumentalities of interstate commerce"; and "those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce". 514 U.S. at 558-59, 115 S.Ct. 1624. As the parties note, at issue is the third category – "those activities that substantially affect interstate commerce".

The Cave Species exist only in Texas. Therefore, at issue are ESA takes concerning *intrastate,* not interstate, activity. Pursuant to *Lopez, Morrison* identified four considerations for use in deciding whether intrastate activity substantially affects interstate commerce. 529 U.S. at 609, 120 S.Ct. 1740.

The first consideration is the economic nature *vel non* of the intrastate activity. *Id.* at 610-11, 120 S.Ct. 1740. Along this line, *Morrison* cited *Lopez*'s cautionary language:

> Admittedly, a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty. But, so long as Congress' authority is limited to those powers enumerated in the Constitution,

> and so long as those enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the Commerce Clause will always engender "legal uncertainty".

Id. at 610, 120 S.Ct. 1740 (quoting *Lopez*, 514 U.S. at 566, 115 S.Ct. 1624).

The second consideration is the presence *vel non* of a jurisdictional element in the statute, which limits its application to instances affecting interstate commerce. *Id.* at 611-12, 120 S.Ct. 1740.

The third consideration is any Congressional findings in the statute or its legislative history concerning the effect the regulated activity has on interstate commerce. *Id.* at 612, 120 S.Ct. 1740.

The final consideration is the attenuation of the link between the intrastate activity and its effect *vel non* on interstate commerce. *Id.*

As described in *Ho*, there are two ways in which intrastate activity might substantially affect interstate commerce. 311 F.3d at 598-99. FWS urges that Cave Species takes have this effect under each method.

First, the activity alone might have such an effect. *See, e.g., NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937). Second, in some circumstances, the activity's effects may be aggregated with those of other similar activities, the sum of which might be substantial in relation to interstate commerce. *Morrison*, 529 U.S. at 613, 120 S.Ct. 1740 (striking down civil remedy provision of Violence Against Women Act, 42 U.S.C. § 13981, while not adopting "a categorical rule

against aggregating the effects of any noneconomic activity"). *See also, e.g., Lopez,* 514 U.S. at 559-61, 115 S.Ct. 1624; *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.,* 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981); *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964); *Wickard v. Filburn,* 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942).

> Whether and how Congress may apply the aggregation principle are controversial questions. The pitfalls are apparent. For example, any imaginable activity of mankind can affect the alertness, energy, and mood of human beings, which in turn can affect their productivity in the workplace, which when aggregated together could reduce national economic productivity. Such reasoning would eliminate any judicially enforceable limit on the Commerce Clause, *thereby turning that clause into what it most certainly is not, a general police power.*

Ho, 311 F.3d at 599 (emphasis added).

In other words, and as the Supreme Court has made quite clear, the aggregation principle has limits. For example, *Lopez* held that gun possession near schools could not be regulated under the Commerce Clause power. The statute at issue proscribed knowing possession of "a firearm at a place that [an individual] knows . . . is a school zone". 18 U.S.C. § 922(q)(1)(A) (1988). The Court held the statute had "nothing to do with 'commerce' or any sort of economic enterprise". 514 U.S. at 561, 115 S.Ct. 1624.

It bears reminding that at issue is the power to regulate interstate *commerce.* In that sense, commerce is "[t]he exchange of goods and services" or "[t]rade and other

business activities". BLACK'S LAW DICTIONARY 263 (7th Ed. 1999). Commerce is traffic, "but it is something more: it is intercourse". *Lopez*, 514 U.S. at 553, 115 S.Ct. 1624 (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189-90, 6 L.Ed. 23 (1824)). In *Wickard*, for example, the intrastate activity (wheat produced solely for producer's personal use) was held "commercial" because it affected market conditions. 317 U.S. at 128, 63 S.Ct. 82. In this regard, *Groome* noted the "broad reading [to be given] commercial and economic activities under the Commerce Clause". 234 F.3d at 208-09.

As mentioned, *Morrison* noted, for aggregation purposes, the importance of the economic nature of the regulated activity: "While we need not adopt a categorical rule against aggregating the effects of *noneconomic* activity in order to decide these cases, thus far . . . our cases have upheld Commerce Clause regulation of intrastate activity *only* where that *activity is economic in nature*". 529 U.S. at 613, 120 S.Ct. 1740 (emphasis added).

Lopez did, however, approve the standard provided in *Maryland v. Wirtz*, 392 U.S. 183, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968) (holding constitutional the 1961 and 1966 extensions of the Fair Labor Standards Act, 29 U.S.C. §§ 203, 206, and 207). *Lopez* stated: "[W]here *a general regulatory scheme bears a substantial relation to commerce*, the *de minimis* character of individual instances arising under that statute is of no consequence". 514 U.S. at 558, 115 S.Ct. 1624 (emphasis in original; internal citation omitted). The *de minimis* instance, however, must be "*an essential part of a larger regulation of economic activity*, in which the regulatory scheme *could* be undercut unless the intrastate activity were regulated". *Id.* at 561,

115 S.Ct. 1624 (emphasis added). *See also Hodel v. Indiana*, 452 U.S. 314, 329 n. 17, 101 S.Ct. 2376, 69 L.Ed.2d 40 (1981); *United States v. Ballinger,* 312 F.3d 1264, 1270 (11th Cir.2002); *Freier v. Westinghouse Electric Corp.*, 303 F.3d 176, 201-03 (2nd Cir.2002), *petition for cert. filed* (U.S. Jan. 6, 2003) (No. 02-1036); *United States v. Cortes*, 299 F.3d 1030, 1035 (9th Cir.2002).

Ho held such a regulatory scheme existed with regard to asbestos removal:

> First, the regulated intrastate activity, asbestos removal, is very much a commercial activity in today's economy. It is a booming industry, given the hazardous nature of asbestos and its seeming ubiquity in older buildings. There is nothing inherently criminal or disfavored about asbestos removal; in fact, it might be considered a public service, and many reputable and certified businesses exist solely to remove asbestos from contaminated buildings.
>
> Both the state and federal governments license businesses and individuals in the field. Most, if not all, asbestos removal projects have a commercial purpose, because handling toxic carcinogens is not something many people enjoy for its own sake. Unless the owner of an asbestos-containing building needs to renovate the building or demolish it for use of the land on which it sits, he is very likely to let sleeping dogs lie and not incur the costs or dangers of asbestos removal.

311 F.3d at 602. Moreover, by using methods less expensive than those required to comply with the regulatory scheme, Ho was able to gain a commercial advantage over his competitors, thereby substantially affecting, or undercutting, the economic regulatory scheme. *Id.* at 603. In

addition to the economic nature of the activity, *Ho* examined the other three *Morrison* considerations in holding aggregation proper. 311 F.3d at 602-04.

In the light of *Lopez* and *Morrison,* the key question for purposes of aggregation is whether the nature of the regulated activity is economic. As noted, *Morrison* and *Lopez* recognize this question is likely to generate "legal uncertainty". *Morrison,* 529 U.S. at 610, 120 S.Ct. 1740; *Lopez*, 514 U.S. at 566, 115 S.Ct. 1624. One way in which the regulated activity might be economic is when, as discussed earlier, the intrastate activity is part of an economic regulatory scheme which could be undercut but for the particular intrastate regulation. *Lopez*, 514 U.S. at 561, 115 S.Ct. 1624.

Post-*Lopez,* our court has faced these questions. A pre-*Morrison* decision, *United States v. Bird*, 124 F.3d 667 (5th Cir.1997), *amended by* 1997 U.S.App. LEXIS 33988, *cert. denied,* 523 U.S. 1006, 118 S.Ct. 1189, 140 L.Ed.2d 320 (1998), affirmed a conviction under the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248. *Bird* held that noncommercial, intrastate activity (threats and intimidation directed at provider of abortion services) may be aggregated to find a substantial effect on interstate commerce. *Id.* at 676-82. For that holding, the determining factor was that "there is a national commercial market in abortion-related services such that the regulated conduct – considered in light of the size and scope of the benchmark market – substantially affects interstate commerce". *Id.* at 677. *See id.* at 681-82.

Noting *Bird* was decided pre-*Morrison, Ho* seems to leave open the question whether aggregation can be extended to non-economic activity. 311 F.3d at 600, n. 10.

Further, in *United States v. Hickman,* 179 F.3d 230 (5th Cir.1999) (pre-*Morrison*), *cert. denied,* 530 U.S. 1203, 120 S.Ct. 2195, 147 L.Ed.2d 232 (2000), and *United States v. McFarland,* 311 F.3d 376 (5th Cir.2002) (post-*Morrison*), *petition for cert. filed,* (U.S. Jan. 7, 2003) (No. 02-8338), our evenly divided en banc court addressed aggregating individual, intrastate robberies to find a substantial effect on interstate commerce under the Hobbs Act, 18 U.S.C. § 1951 (criminalizing efforts to "obstruct[], delay[], or affect[] commerce or the movement of any article or commodity in commerce, by robbery or extortion . . . ").

The dissent in *Hickman,* adopted by half of our en banc court, stated:

> [I]ndividual acts cannot be aggregated if their effects on commerce are causally independent of one another. That is, if the effect on interstate commerce directly attributable to one instance of an activity does not depend in substantial part on how many other instances of the activity occur, there is an insufficient connection – in other words, an interactive effect – and the effect of different instances cannot be added. If, on the other hand, the occurrence of one instance of the activity makes it substantially more or less likely that other instances will occur, then there is an interactive effect and the effects of different instances can be added.

179 F.3d at 233 (Higginbotham, J., dissenting).

This "interactive effect" requirement flows from the requirement in *Lopez* that failure to regulate the intrastate activity could "undercut" the entire scheme. Along this line, *Ho* held that the instance of intrastate asbestos

removal had an effect on the larger economic regulation of the asbestos industry. 311 F.3d at 602.

In addressing the Hobbs Act issue faced in *Hickman*, one dissent in *McFarland*, again adopted by half of our en banc court, stated:

> Assuming, *arguendo*, that there is a class of [*Lopez*] category three cases [substantial effect] as to which there are no restraints whatever on aggregation, we conclude that such a class would *exclude* instances where "the regulated activity" is *not* properly described as "commercial" or "economic" *in the same general sense* as "commercial."

311 F.3d at 396 (Garwood, J., dissenting) (emphasis in original). In the intervening light of *Morrison*, that dissent agreed with the *Hickman* dissent.

> Where the Supreme Court has applied aggregation to uphold federal regulation of intrastate conduct against constitutional challenge under the Commerce Clause, there has always been a *rational basis* to find sufficient interrelationship or commonality of effect on interstate commerce among the discrete intrastate instances regulated and between them and a scheme of regulation (protection, enhancement or restriction) of some particular interstate market or activity such that the regulation of those intrastate activities can rationally be viewed as necessary to the effectiveness of or a meaningfully supporting part of the scheme of regulation of that particular interstate activity or market.

Id. at 401 (emphasis added).

Plaintiffs maintain that Cave Species takes have no relationship, let alone a substantial one, to interstate commerce. They concede, however, that all takes of endangered species, if aggregated, would have the requisite substantial effect; but, they maintain, aggregation is not proper because Cave Species takes are non-economic in nature and not an essential part of a regulatory scheme.

ESA was enacted in 1973 in response to threats to fish, wildlife, and plants (wildlife). 16 U.S.C. § 1531(a)(1). These threats arose principally from "pollution, destruction of habitat and the *pressures of trade*". H.R. Rep. No. 93-412, at 2 (1973) (emphasis added). Congress noted that "the pace of disappearance of species is accelerating". *Id.* at 4. This acceleration was troubling because, *inter alia,* "it is in the best interest of mankind to minimize the losses of genetic variations". *Id.* at 5. That interest, Congress said, was "simple: [the genetic variations] are potential resources". *Id.*

> They are keys to puzzles which we cannot solve, and may provide answers to questions which we have not yet learned to ask.
>
> To take a homely, but apt, example: one of the critical chemicals in the regulation of ovulation in humans was found in a common plant. Once discovered and analyzed, humans could duplicate it synthetically, but had it never existed – or had it been driven out of existence before we knew its potentialities – we would never have tried to synthesize it in the first place.
>
> Who knows, or can say, what potential cures for cancer or other scourges, present or future, may lie locked up in the structures of plants which may yet be undiscovered, much less analyzed?

> More to the point, who is prepared to risk . . . those potential cures by eliminating those plants for all time? Sheer self-interest impels us to be cautious.

Id.

Tennessee Valley Authority v. Hill, 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978) (*TVA*), the famous snail darter decision, reviewed ESA's legislative history in the process of upholding an injunction pursuant to the Secretary of the Interior's determination that the operation of a federal dam would eradicate an endangered species. At issue was 16 U.S.C. § 1536, which requires federal agencies to consult with the Secretary regarding projects and to "utilize their authorities in furtherance of the purposes of [ESA]. . . . " The Court recognized Congress' "newly declared national policy of preserving endangered species", *id.* at 176, 98 S.Ct. 2279, and held: "The plain intent of Congress in enacting [ESA] was to halt and reverse the trend toward species extinction, *whatever the cost*", *id.* at 184, 98 S.Ct. 2279 (emphasis added).

Of course, notwithstanding this "plain intent", ESA's take provision as applied in this case must have firm footing in the Commerce Clause. In this regard, ESA's take provision has no jurisdictional requirement that might otherwise limit its application to species bearing some relationship to interstate commerce. Nor does the take provision list the species to be protected. Instead, ESA incorporates listings, promulgated from time to time by FWS, that determine which species are covered by the take provision. 16 U.S.C. § 1533(c).

A.

Aggregation or no, the first of the four *Morrison* considerations concerns the economic nature *vel non* of the *regulated activity*. On this key point, at issue is what constitutes the "regulated activity". Plaintiffs assert that, for evaluating substantial effect, we should look only to the expressly regulated activity – Cave Species takes. FWS responds that, in addition, we should consider such regulation in the light of plaintiffs' planned commercial development and, by extension, its effect on interstate commerce.

The district court agreed with FWS and looked *primarily* to plaintiffs' planned development:

> [T]he regulated activity in this case is plaintiffs' alleged take of the Cave Species by their planned development of the Property. This development includes plans to build "a shopping center, a residential subdivision, and office buildings" on the Property. . . . This activity, standing alone, "would easily be classified as substantially affecting interstate commerce."

169 F.Supp.2d at 658 (internal citations omitted).

The district court characterized plaintiffs' challenge as being "as-applied". Whether it is "as-applied" or "facial", the district court correctly concluded it should evaluate plaintiffs' conduct in determining whether the take provision, as applied to the Cave Species, was unconstitutional. *See City of Chicago v. Morales*, 527 U.S. 41, 78 n. 1, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999) (Scalia, J., dissenting) (aside from First Amendment "overbreadth" cases, "a facial attack, since it requires unconstitutionality in all circumstances, necessarily presumes that the litigant

presently before the court would be able to sustain an as-applied challenge"); *see also United States v. Salerno,* 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). The above-quoted passage from the district court opinion reflects, however, that the court extended the scope of this relevant conduct beyond plaintiffs' Cave Species takes; it *primarily* considered plaintiffs' commercial motivations that would underlie the takes. As discussed below, and consistent with the Supreme Court's interpretation of the Commerce Clause, we conclude that the scope of inquiry is primarily whether the *expressly regulated activity* substantially affects interstate commerce, *i.e.,* whether takes, be they of the Cave Species or of all endangered species in the aggregate, have the substantial effect.

In this regard, neither this court, nor the Supreme Court, has explicitly determined the scope of the substantial effects analysis. Nonetheless, the Supreme Court has expressed concerns about this issue. In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng'rs,* 531 U.S. 159, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001), under § 404(a) of the Clean Water Act, 33 U.S.C. § 1344(a), the Corps of Engineers claimed jurisdiction over abandoned sand and gravel pits which had become seasonal ponds and, concomitantly, habitats for migratory birds. As a result, the Corps prevented construction of a landfill on a site. The landfill developers contended that, through such regulation, the Corps overstepped its statutorily-prescribed jurisdictional bounds, and, alternatively, Congress exceeded its Commerce Clause power.

Resolving the case by interpreting the Clean Water Act, the Court avoided the constitutional issue. Nevertheless, it shed light on the scope-issue at hand:

> [The Government] . . . note[s] that the protection of migratory birds is a national interest of very nearly the first magnitude, and that, as the Court of Appeals found, millions of people spend over a billion dollars annually on recreational pursuits relating to migratory birds. These arguments raise significant constitutional questions. For example, we would have to evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce. This is not clear, for although the Corps has claimed jurisdiction over petitioner's land because it contains water areas used as habitat by migratory birds, respondents now, *post litem motam, focus upon the fact that the regulated activity is petitioner's municipal landfill, which is plainly of commercial nature. But this is a far cry, indeed, from the "navigable waters" and "waters of the United States" to which the statute by its terms extends.*

Id. at 173, 121 S.Ct. 675 (emphasis added; internal citation and quotation omitted).

Again, we must resolve the question of which activities are to be primarily considered in order to determine substantial effect *vel non.* Each of the three *Lopez* categories recognizes Congress' power to regulate where the *object of regulation* relates to interstate commerce: channels, instrumentalities, or activities. Neither the plain language of the Commerce Clause, nor judicial decisions construing it, suggest that, concerning substantial effect *vel non,* Congress may regulate activity (here, Cave Species takes) solely because non-regulated conduct (here, commercial development) by the actor engaged in the regulated activity will have some connection to interstate commerce.

In expanding its scope-inquiry to plaintiffs' commercial motivations, the district court relied on *Groome,* which evaluated Congress' Commerce Clause power to regulate under the Fair Housing Act, 42 U.S.C. § 3604(f)(3)(B). *Groome* stated that, in *Lopez* and *Morrison,* "neither the 'actors' nor the 'conduct' *of the regulation* had a commercial character". 234 F.3d at 204 (emphasis added). *Groome* recognized that, in analyzing the effect on interstate commerce, courts look only to the expressly regulated activity. In *Groome*, that was the sale and rental of housing. The actor's conduct was commercial in nature, but that characteristic was only relevant insofar as it fell within the regulated activity. *Id.* at 205-16.

Unlike *Groome,* the district court in this case looked primarily beyond the regulated conduct – Cave Species takes – in order to assess effect on interstate commerce. It looked to plaintiffs' planned commercial development of the property where the takes would occur. True, the *effect* of regulation of ESA takes may be to prohibit such development in some circumstances. But, Congress, through ESA, is not directly regulating commercial development.

To accept the district court's analysis would allow application of otherwise unconstitutional statutes to commercial actors, but not to non-commercial actors. There would be no limit to Congress' authority to regulate intrastate activities, so long as those subjected to the regulation were entities which had an otherwise substantial connection to interstate commerce.

Along this line, looking primarily beyond the regulated activity in such a manner would "effectually obliterate" the limiting purpose of the Commerce Clause. *Jones & Laughlin Steel Corp.,* 301 U.S. at 37, 57 S.Ct. 615.

Concomitantly, the facial challenges in *Lopez* and *Morrison* would have failed. For instance, regulation of gun possession near schools, at issue in *Lopez,* would arguably pass constitutional muster as applied to a possessor who was a significant gun salesman. Therefore, § 922(q)(1)(A) could not have been facially unconstitutional. *See Salerno,* 481 U.S. at 745, 107 S.Ct. 2095. Similarly, the Violence Against Women Act, at issue in *Morrison,* would arguably have been a constitutional exercise of Congressional power if it were used to prosecute a person who committed violence against women and then sold a substantial number of videotapes of the encounter in interstate markets. It too would have withstood a facial attack. Such results, of course, run contrary to *Lopez* and *Morrison.*

Ho ruled that "the regulated intrastate activity, asbestos removal, is very much a commercial activity in today's economy. . . . Both the state and federal governments license businesses and individuals in the field. Most, if not all, asbestos projects have a commercial purpose. . . . " 311 F.3d at 602. Thus *Ho* primarily analyzed the expressly regulated activity. Only after doing so did *Ho* note: "Moreover, [plaintiff's] activities were driven by commercial considerations". *Id.*

Two circuits have published opinions upholding ESA's constitutionality; they looked, at times, to the nature of the actor's general conduct. *National Association of Home Builders v. Babbitt,* 130 F.3d 1041 (D.C.Cir.1997), *cert. denied,* 524 U.S. 937, 118 S.Ct. 2340, 141 L.Ed.2d 712 (1998) (*NAHB*) (pre-*Morrison*); *Gibbs v. Babbitt,* 214 F.3d 483 (4th Cir.2000), *cert. denied, Gibbs v. Norton,* 531 U.S. 1145, 121 S.Ct. 1081, 148 L.Ed.2d 957 (2001). (In addition, the Ninth Circuit, in upholding the constitutionality of the Eagle Protection Act, 16 U.S.C. 668, approvingly cited a

district court decision, *Palila v. Hawaii Dep't of Land & Natural Resources*, 471 F.Supp. 985 (D.Haw.1979), *aff'd*, 639 F.2d 495 (9th Cir.1981), concerning ESA's effect on interstate commerce. *United States v. Bramble*, 103 F.3d 1475, 1481 (9th Cir.1996).)

In *NAHB* and *Gibbs*, however, the actor's general conduct was not the sole basis for finding economic activity or a substantial effect on interstate commerce. To this extent, *NAHB* and *Gibbs* are consistent with the analysis in *Ho*.

NAHB, decided pre-*Morrison*, considered whether Congress had the power to regulate takes of the Delhi Sands Flower-Loving Fly, a species found only in California. The takes were caused by a planned hospital renovation. For a divided panel, two members held ESA constitutional, each on different grounds; one member opined it was unconstitutional.

In the main opinion, Judge Wald upheld ESA on two bases: as a valid regulation of the channels of interstate commerce; and because the takes substantially affected interstate commerce. For the substantial effect analysis, she did not look beyond the expressly-regulated activity. She did so, however, for the "channels of interstate commerce" analysis. 130 F.3d at 1048. There is, of course, good reason to look beyond the regulated activity to determine whether such channels are being used; whether an actor deals in these channels is directly relevant.

In her *NAHB* concurrence, Judge Henderson concluded the takes affected biodiversity, which in turn substantially affected interstate commerce. She briefly noted, however, that the regulation plainly affected interstate commerce because "[it] relates to both the proposed

redesigned traffic intersection and the hospital it is intended to serve. . . . " *NAHB,* 130 F.3d at 1059 (Henderson, J., concurring).

Of course, the ESA regulation at issue in *NAHB* did not relate to traffic intersections; it related to fly takes. Judge Henderson relied, in part, on the following language from *Heart of Atlanta Motel* to support her conclusion: "The facilities and instrumentalities used to carry on this commerce such as railroads, truck lines, ships, rivers, *and even highways* are also subject to congressional regulation, so far as is necessary to keep interstate traffic upon fair and equal terms." 379 U.S. at 271, 85 S.Ct. 348 (emphasis added). This statement provides an example of Congress' power to regulate the use of the channels of interstate commerce, rather than those activities having a substantial effect on interstate commerce.

While the take provision may have prevented the hospital renovations in *NAHB* or the commercial developments in the case at hand, ESA does not *directly* regulate these activities. The *NAHB* dissent noted:

> An alternative reading of Judge Henderson's second justification with its stress on the effect of the regulation upon the highway and hospital is that she concludes that Congress may regulate purely intrastate activities – *e.g.,* the habitat modification of the fly – where the *regulation* will then affect items which are arguably in interstate commerce. Again, I do not see the stopping point. Congress is not empowered either by the words of the Commerce Clause or by its interpretation in *Lopez* to regulate any non-commercial activity where the regulation will substantially affect interstate commerce. . . . Nowhere is it suggested that Congress can regulate activities

> not having a substantial effect on commerce *because the regulation itself can be crafted in such a fashion as to have such an effect.*

Id. at 1067 (Sentelle, J., dissenting) (emphasis added). As noted, however, Judge Henderson did not rely *primarily* on the commercial development, but instead analyzed the expressly regulated activity – the takes' effect on biodiversity.

Gibbs held Congress did not exceed its Commerce Clause power by regulating red wolf takes. 214 F.3d at 487. The wolves had been reintroduced on federal land, but had roamed onto private land in North Carolina and Tennessee. In holding the wolves had a substantial effect on interstate commerce, a divided panel noted that the take provision limited the ability to protect livestock and other agricultural products from the wolves: "The regulation here targets takings that are *economically motivated* – farmers take wolves to protect valuable livestock and crops." *Id.* at 495 (emphasis added). As discussed *infra*, *Gibbs* held primarily, however, that the expressly regulated activity – red wolf takes, regardless of farmers' motivations – was economic in nature.

In the light of the successful *facial* challenges in *Lopez* and *Morrison* and the emphasis our court and sister circuits have placed on the economic nature *vel non* of the expressly regulated activity, the district court erred in looking primarily to plaintiffs' commercial motivations.

B.

As discussed earlier, there are two ways in which intrastate activity can substantially affect interstate commerce: the activity can be of a nature and scope that it,

alone, has such an effect; and, in certain circumstances, the activity can be aggregated with similar activities, so that the sum of the activities has the requisite substantial effect. As also discussed, FWS contends regulation of Cave Species takes is proper under either method. For either, the goal remains the same: distinguishing between "what is truly national and what is truly local". *Morrison*, 529 U.S. at 617-18, 120 S.Ct. 1740; *Lopez*, 514 U.S. at 567-68, 115 S.Ct. 1624; *Ho*, 311 F.3d at 601.

1.

In urging Cave Species takes, alone, have a "direct relationship" with, and substantial effect on, interstate commerce, FWS claims two significant effects: the "substantial" scientific interest generated by the Cave Species; and their *possible* future commercial benefits.

a.

Concerning the scientific interest effect, some scientists have studied the Cave Species. In doing so, some of them have traveled to Texas. In coordination with this research, some Cave Species have been transported to and from museums in five States. Finally, articles about the Cave Species have been published in scientific journals.

According to FWS, this demonstrates the Cave Species "play a role in interstate commerce". Obviously, even assuming this is true, this does not necessarily constitute the substantial effect mandated by *Lopez* and *Morrison*. To the extent FWS contends that the loss of the Cave Species would affect the scientific travel or publication industries, it offers no evidence that it would substantially do so. In

fact, the minimal evidence presented by FWS indicates such an effect would be negligible.

In upholding the red wolf take provision, *Gibbs* held the takes "implicate[d] a variety of commercial activities and [was] closely connected to several interstate markets". 214 F.3d at 492. Chief among them were red-wolf-related tourism, "scientific research", and the "commercial trade" in pelts. *Id.* at 493-95. *Gibbs* held the "takings of red wolves in the aggregate have a sufficient impact on interstate commerce". *Id.* at 493. (As discussed, *Gibbs* also observed that the takes were motivated by commercial incentives.)

Obviously, the commercial impact of red wolves is significantly greater than that of the Cave Species. *See id.* at 493-94 ("According to a study . . . the recovery of the red wolf and increased visitor activities could result in a significant regional economic impact. [The study's author] estimates that northeastern North Carolina could see an increase of between $39.61 and $183.65 million per year in tourism-related activities" (internal citation omitted).).

In the case of the Cave Species, any connection between takes and impact on the scientific travel or publication industries is, as noted, negligible. Under *Morrison*'s fourth consideration, any claim that the connection rises to a "substantial relationship" is far too attenuated to pass muster.

b.

Alternatively, FWS claims future commercial benefits derived from the Cave Species will be significant enough to substantially affect interstate commerce. Research

concerning certain endangered species has been used in the treatment of disease. *See, e.g.*, Holly Doremus, *Patching the Ark: Improving Legal Protection of Biological Diversity*, 18 ECOLOGY L.Q. 265, 270-71 (1991) (study of endangered pupfish in relation to kidney disease); Keith Rizzardi, *Toothless? The Endangered Manatee and the Florida Manatee Sanctuary Act*, 24 FLA. ST. U.L. Rev. 377, 380 (1997) (study of endangered manatees in relation to hemophilia).

FWS posits here:

> The value of the cave species . . . *may* be even more significant than those of the pupfish and the manatee, given the unique features of cave species. *Although little is yet understood about these particular species,* scientists have long observed that cave species, because of their peculiar habitats, often exhibit incredibly low metabolic rates and possess extremely long lifespans . . . compared to other invertebrates. Such characteristics suggest that further study of these species *could* lead to important developments in our understanding of longevity. . . .

(Emphasis added; internal citations and quotations omitted). In short, this claim is not supported by evidence concerning Cave Species. It is conjecture.

This contention, whatever its merits may ultimately be, runs afoul of the attenuation consideration. The *possibility* of future substantial effects of the Cave Species on interstate commerce, through industries such as medicine, is simply too hypothetical and attenuated from the regulation in question to pass constitutional muster. *See Morrison*, 529 U.S. at 612, 120 S.Ct. 1740.

2.

In the alternative, FWS contends that Cave Species takes may be aggregated with those of all other endangered species. As noted, plaintiffs concede this aggregation would have the requisite substantial effect on interstate commerce. *See NAHB,* 130 F.3d at 1053-54 ("In the aggregate, however, we can be certain that the extinction of the species and the attendant decline in biodiversity will have a real and predictable effect on interstate commerce.").

At issue is what circumstances must be present in order to justify aggregation when, as in this case, intrastate activity has a *de minimis* effect on interstate commerce. As noted, *Lopez* and *Morrison* instruct courts to consider, *inter alia*, the activity's economic or commercial nature. And, as discussed *supra,* one key way by which intrastate activity may be considered "economic" or "commercial" is through its importance to an economic regulatory scheme.

As noted earlier, whether an activity is economic or commercial is to be given a broad reading in this context. *Groome*, 234 F.3d at 208-09. Nevertheless, in a sense, Cave Species takes are neither economic nor commercial. There is no market for them; any future market is conjecture. If the speculative future medicinal benefits from the Cave Species makes their regulation commercial, then almost anything would be. Moreover, unlike the red wolves (and their pelts) in *Gibbs*, there is no historic trade in the Cave Species, nor do tourists come to Texas to view them.

FWS posits that, because, in the aggregate with other endangered species, Cave Species takes will have a substantial effect on interstate commerce, these takes can be classified as commercial. To accept such a justification

would render meaningless any "economic nature" prerequisite to aggregation. An activity cannot be aggregated based solely on the fact that, post-aggregation, the sum of the activities will have a substantial effect on commerce. This would vitiate *Lopez* and *Morrison*'s seeming requirement that the intrastate instance of activity be commercial. Noneconomic and noncommercial activity could be aggregated so long as, if aggregated, it would have a substantial effect. *Lopez* and *Morrison* stand against such a proposition.

On the other hand, the regulation of the Cave Species is part of a larger regulation of activity. The take provision as applied to the Cave Species is part of the take provision generally and ESA as a whole. More is required, however. As discussed earlier, non-commercial, intrastate activities must be "essential" to an *economic* regulatory scheme's efficacy in order, under this rationale, for aggregation to be appropriate.

First, the larger regulation must be directed at activity that is economic in nature. *Lopez*, 514 U.S. at 561, 115 S.Ct. 1624. *See also Morrison,* 529 U.S. at 610, 120 S.Ct. 1740. ESA states that endangered species are of "esthetic, ecological, educational, historical, recreational, and scientific value. . . . " 16 U.S.C. § 1531(a)(3). Along this line, courts may also look to ESA's legislative history. *Morrison,* 529 U.S. at 612, 120 S.Ct. 1740. In this light, ESA's protection of endangered species is economic in nature. As noted, ESA's drafters were concerned by the "incalculable" value of the genetic heritage that might be lost absent regulation. *See* H.R. Rep. No. 93-412, at 4. With regard to a precursor to ESA, the Senate Report observed:

> From a pragmatic point of view, the protection of an endangered species of wildlife with some commercial value may permit the regeneration of that species to a level where controlled exploitation of that species can be resumed. In such a case businessmen may profit from the trading and marketing of that species for an indefinite number of years, where otherwise it would have been completely eliminated from commercial channels in a very brief span of time. *Potentially more important,* however, is the fact that with each species we eliminate, we reduce the [genetic] pool . . . available for use by man in future years. Since each living species and subspecies has developed in a unique way to adapt itself to the difficulty of living in the world's environment, as a species is lost, its distinctive gene material, which may subsequently prove invaluable to mankind in improving domestic animals or increasing resistance to disease or environmental contaminant, is also irretrievably lost.

S. Rep. No. 91-526, at 1415 (1969) (emphasis added).

Aside from the economic effects of species loss, it is obvious that the majority of takes would result from economic activity. *See, e.g.,* 16 U.S.C. § 1531(a)(1) ("various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation"); 16 U.S.C. § 1533(f) (recovery plans should give priority to species that are in "conflict with construction or other development projects or other forms of economic activity . . . "). Indeed, Congress' findings are reflected in the case at hand: the Cave Species takes would occur as a result of plaintiffs' planned commercial development.

Moreover, ESA is "truly national" in scope. *See Morrison,* 529 U.S. at 617-18, 120 S.Ct. 1740; *Lopez*, 514 U.S. at 567-68, 115 S.Ct. 1624. This is the case, despite the concerns raised by amicus State of Texas. It is true that land use and wildlife preservation are traditional areas of state concern. Nevertheless, "this authority is shared with the Federal Government when [it] exercises one of its enumerated constitutional powers". *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204, 119 S.Ct. 1187, 143 L.Ed.2d 270 (1999).

Second, in order to aggregate, the regulated intrastate activity must also be an "essential" part of the economic regulatory scheme. Judge Wald's opinion in *NAHB* held ESA's take provision constitutional as applied to an intrastate species of insect. Key to this conclusion, and challenged by the other two panel members, was the determination that individual takes of the species could be aggregated. The opinion assumed aggregation, holding that, because "biodiversity has a . . . substantial . . . effect on . . . interstate commerce, 'the *de minimis* character of individual instances arising under [ESA] is of no consequence'". 130 F.3d at 1053, n. 14 (quoting *Lopez,* 514 U.S. at 558, 115 S.Ct. 1624).

The opinion did not discuss, however, *Lopez*' earlier requirement that *de minimis* instances of activity subsumed within a regulatory scheme must be essential to that scheme, so that it could be *undercut* without the particular regulation. 514 U.S. at 561, 115 S.Ct. 1624. Along this line, the *NAHB* dissent noted: "There is no showing, but only the rankest of speculation, that a reduction or even complete destruction of the viability of the [species] will in fact affect land and objects that are

involved in interstate commerce". 130 F.3d at 1065 (Sentelle, J., dissenting) (internal citations and quotations omitted).

In *TVA*, however, the Court recognized that "Congress was concerned [not only] about the *unknown* uses that endangered species might have[, but also] about the *unforeseeable* place such creatures may have in the chain of life on this planet". 437 U.S. at 178-79, 98 S.Ct. 2279 (emphasis in original). Citing that portion of *TVA*, *Gibbs* reaffirmed Congress' power to "manage the interdependence of endangered animals and plants in large ecosystems". 214 F.3d at 496. *See also NAHB,* 130 F.3d at 1052 n. 11; *id.* at 1058 (Henderson, J., concurring) ("The effect of a species' continued existence on the health of other species within the ecosystem seems to be generally recognized among scientists.").

FWS contends: "Allowing a particular take to escape regulation because, viewed alone, it does not substantially affect interstate commerce, would undercut the ESA scheme and lead to piece-meal extinctions". Along this line, it maintains that takes of any species threaten the "interdependent web" of all species. Congress described this "critical nature of the interrelationships of plants and animals between themselves and with their environment". H.R. Rep. No. 93-412, at 6. In fact, according to Congress, the "essential purpose" of ESA is "to protect the ecosystems upon which we and other species depend". *Id.* at 10.

ESA's take provision is economic in nature and supported by Congressional findings to that effect. Although, as noted, there is no express jurisdictional element in ESA, our analysis of the interdependence of species compels the conclusion that regulated takes under ESA do

affect interstate commerce. In this sense, ESA's take provision *is limited* to instances which "have an explicit connection with or effect on interstate commerce". *Morrison*, 529 U.S. at 611-12, 120 S.Ct. 1740 (internal quotations omitted).

Finally, the link between species loss and a substantial commercial effect is not attenuated. This holding will not allow Congress to regulate general land use or wildlife preservation. *See id.* at 612-13, 120 S.Ct. 1740 ("We rejected these . . . arguments because they would permit Congress to 'regulate not only all violent crime, but all activities that might lead to violent crime. . . . '" (quoting *Lopez,* 514 U.S. at 564, 115 S.Ct. 1624)).

ESA is an economic regulatory scheme; the regulation of intrastate takes of the Cave Species is an essential part of it. Therefore, Cave Species takes may be aggregated with all other ESA takes. As noted, plaintiffs concede such aggregation substantially affects interstate commerce. In sum, application of ESA's take provision to the Cave Species is a constitutional exercise of the Commerce Clause power.*

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* FWS also contends that the "take" provision enables the United States to meet its treaty obligations and was enacted because of a concern about Congress' Commerce Clause power, pursuant to Article I, § 8, cl. 3, "[t]o regulate Commerce with foreign Nations". We need not reach this issue.

III.

For the foregoing reasons, the judgment is

AFFIRMED.

DENNIS, Circuit Judge, concurring:

I join in the Court's opinion and write separately only to set forth additional analysis in support of the Court's conclusion.

The plaintiffs contend that Congress lacks the authority to regulate, under the ESA, activity that endangers or threatens intrastate, non-commercial species. The Court correctly upholds the challenged ESA provision as applied to such species.

One express purpose of the ESA is to provide a comprehensive program for the conservation of endangered and threatened species and the ecosystems upon which they depend. The extinction or harm of endangered or threatened species has a substantial impact upon interstate commerce because in many cases those species or products derived from them are articles of commerce. Further, their extinction or harm could have a significant deleterious effect upon interstate commerce between the states by adversely affecting the commercial intercourse of non-endangered species or their derivatives. Finally, the conservation of the ecosystems upon which these commercial species depend may require the regulation of activities harmful to non-commercial species concentrated within a single state or region. Consequently, Congress has the authority to make a rational determination to conserve such non-commercial, intrastate species as an essential or integral part of the comprehensive ESA program that

regulates activities having a substantial impact on interstate commerce.

At least as early as *United States v. Darby,* the Supreme Court recognized that Congress has the power to regulate intrastate activities that it rationally finds necessary to regulate in order to effectuate its regulation of interstate commerce.[1] In *Darby,* emphasis was placed on whether the regulation was an "appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce."[2] This approach harks back to *McCulloch v. Maryland,* which noted that the Constitution authorizes Congress to make "all laws which shall be necessary and proper for carrying into execution the foregoing powers."[3] Chief Justice Marshall found that the Necessary and Proper clause accords to Congress that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.[4]

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[1] 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609 (1941).

[2] *Id.* at 118, 61 S.Ct. 451.

[3] 4 Wheat. 316, 17 U.S. 316, 411-12, 4 L.Ed. 579 (1819) (quoting U.S. Const. art. I, § 8, cl. 18); *see* Robert L. Stern, *The Commerce Clause and the National Economy, 1933-1946,* 59 Harv. L. Rev. 883, 890 (1946).

[4] *McCulloch,* 17 U.S. at 421.

Darby also pointed out that the Court had often sustained legislation enacted under powers other than the Commerce Clause, "when the means chosen, although not themselves within the granted power, were nevertheless deemed appropriate aids to the accomplishment of some purpose within an admitted power of the national government."[5] A similar approach had been used in cases applying the Commerce Clause to intrastate activities "when the intrastate transactions were so commingled with or related to interstate commerce as to demand that all be regulated if the interstate commerce were to be effectively controlled."[6]

Indeed, the Supreme Court's cases, from *Darby* to the present, confirm that Congress has the authority under the Constitution, through the intersection of the Commerce Clause and the Necessary and Proper Clause, to regulate an intrastate activity that it could not reach standing alone, if the regulation is essential or integral to the maintenance of a larger regulatory scheme properly governing interstate commerce.[7] This rule has recently

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[5] *Darby*, 312 U.S. at 121, 61 S.Ct. 451 (citing *Jacob Ruppert, Inc. v. Caffey*, 251 U.S. 264, 40 S.Ct. 141, 64 L.Ed. 260 (1920); *James Everard's Breweries v. Day*, 265 U.S. 545, 560, 44 S.Ct. 628, 68 L.Ed. 1174 (1924); *Westfall v. United States*, 274 U.S. 256, 259, 47 S.Ct. 629, 71 L.Ed. 1036 (1927)).

[6] Stern, *The Commerce Clause*, 59 Harv. L. Rev. at 891 (citing *Houston, E. & W. Tex. Ry. Co. v. United States*, 234 U.S. 342, 34 S.Ct. 833, 58 L.Ed. 1341 (1914) (Shreveport Rate Cases); *Railroad Comm'n of Wis. v. Chicago Burlington & Quincy Ry. Co.*, 257 U.S. 563, 42 S.Ct. 232, 66 L.Ed. 371 (1922); *Southern Ry. Co. v. United States*, 222 U.S. 20, 32 S.Ct. 2, 56 L.Ed. 72 (1911); *Baltimore & Ohio Ry. Co. v. ICC*, 221 U.S. 612, 31 S.Ct. 621, 55 L.Ed. 878 (1911)).

[7] *See, e.g., United States v. Lopez*, 514 U.S. 549, 561, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (finding that the regulation of gun possession near schools under the Gun-Free School Zones Act was "not

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been designated by one scholar as the "comprehensive scheme" principle.[8] This Court and its judges have, in effect, recognized the principle by concluding that both commercial and noncommercial activity may be regulated by Congress if the regulation is an essential or integral part of a larger comprehensive scheme properly regulating activity substantially affecting interstate commerce.[9]

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an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated"); *Hodel v. Indiana*, 452 U.S. 314, 329 n. 17, 101 S.Ct. 2376, 69 L.Ed.2d 40 (1981) ("A complex regulatory program . . . can survive a Commerce Clause challenge without showing that every single facet of the program is independently and directly related to a valid congressional goal. It is enough that the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfies [the substantial effect] test."); *Maryland v. Wirtz*, 392 U.S. 183, 192-93, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968) (refusing to "excise, as trivial, individual instances" of regulation because the effect of such excision would be to undermine the effectiveness of the regulatory program); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 121, 62 S.Ct. 523, 86 L.Ed. 726 (1942) (stating that Congress has the power to enact such regulations of intrastate activity as are "necessary and appropriate" to make the regulation of interstate commerce effective); *Darby*, 312 U.S. at 118, 61 S.Ct. 451 ("[Congress's power] extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce."); *NLRB v. Jones & Laughlin Steel Corporation*, 301 U.S. 1, 36, 57 S.Ct. 615, 81 L.Ed. 893 (1937) ("The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a 'flow' of interstate or foreign commerce.").

[8] *See* Adrian Vermeule, *Does Commerce Clause Review Have Perverse Effects?* 46 Vill. L. Rev. 1325 (2001); Adrian Vermeule, *Centralization and the Commerce Clause*, 31 Envtl. L. Rep. 11334 (2001).

[9] *See Groome Resources Ltd. v. Parish of Jefferson*, 234 F.3d 192, 205 (5th Cir.2000) ("[A] close reading of *Lopez* . . . provides two recognized and historically rooted means of congressional regulation under

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The free-standing statutes at issue in *Lopez* and *United States v. Morrison*[10] addressed intrastate offenses of the kind that have been traditionally dealt with by state legislation. Neither statute was an integral or ancillary part of a comprehensive scheme reasonably designed to regulate activity having a substantial effect on interstate commerce. In *Lopez* the Court held that the Gun-Free School Zones Act, which made it a federal offense to knowingly possess a firearm in a known or reasonably recognizable school zone, exceeded Congress' commerce clause authority because the criminalized conduct was not

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the commerce power: (1) whether the activity is 'any sort of economic enterprise, however broadly one might define those terms'; or (2) whether the activity exists as 'an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.'" (quoting *Lopez*, 514 U.S. at 561, 115 S.Ct. 1624)); *United States v. Bird*, 124 F.3d 667, 675 (5th Cir.1997) ("As a federal criminal statute regulating intrastate *noncommercial* conduct, [the challenged section of the Freedom of Access to Clinic Entrances Act] must be justified, if at all, as 'an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.'" (quoting *Lopez*, 514 U.S. at 561, 115 S.Ct. 1624)); *see also United States v. Hickman*, 179 F.3d 230, 231 (5th Cir.1999) (en banc) (Higginbotham, J., dissenting) ("Congress may protect, enhance, or restrict some particular interstate economic market, such as those in wheat, credit, minority travel, abortion service, illegal drugs, and the like, and Congress may regulate intrastate activity as part of a broader scheme."); *United States v. Kirk*, 105 F.3d 997, 1014 (5th Cir.1997) (en banc) (Jones, J., dissenting) (stating that the most critical consideration in determining the constitutionality of a statute prohibiting certain possessions of machine guns is whether it "fulfills the mission of regulating interstate commerce as (1) a regulation of economic activity which, although itself local, has substantial effect on interstate commerce, or (2) a regulation of activity which is essential to maintaining a larger, interstate regime of economic activity.").

[10] *United States v. Morrison*, 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000).

an economic activity that substantially affected interstate commerce. The Court expressly noted that the statute was not an essential part of a larger regulation of economic activity, in which the regulatory scheme would be undercut unless the intrastate activity were regulated.[11] Similarly, in *Morrison* the Court held that the Commerce Clause does not authorize Congress to enact a federal civil remedy for the victims of gender-motivated violence. The Court stated that gender-motivated crimes of violence are not economic activity substantially affecting interstate commerce.[12]

In this case, by contrast, the prohibition of the Cave Species takes is integral to achieving Congress's rational purpose in enacting the ESA. In particular, the ESA regulates interstate commerce by attempting to prevent the extinction of both commercial and non-commercial species. Regulations under the ESA therefore significantly affect the nation's economy and welfare. Non-commercial species are in many instances vital to the survival of ecosystems upon which commercial species are dependent. The interrelationship of commercial and non-commercial species is so complicated, intertwined, and not yet fully understood that Congress acted rationally in seeking to protect all endangered or threatened species from extinction or harm. The ESA is a necessary and proper means not only to conserve the nation's valuable biological resources, but also to promote interstate commerce involving those resources. While some states, including Texas, have taken steps to protect species against extinction, the threat of extinction of species and loss of their habitat is

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[11] *Lopez*, 514 U.S. at 561, 115 S.Ct. 1624.

[12] *Morrison*, 529 U.S. at 613, 120 S.Ct. 1740.

both a worldwide and a national problem that requires at least a comprehensive national solution. Furthermore, as the Congress recognized, some of the presently covered non-commercial species will prove to be of "incalculable" future value to the nation and its economy because they are sources of genetic, scientific, and biomedical research and development that will likely facilitate the production of commercial goods, services, and techniques.

Thus, as the opinion states, the constitutionality of the FWS's regulation of the Cave Species takes does not depend on aggregating the effects of all takes of endangered species in order to arrive at a sum effect on interstate commerce that is, post-aggregation, substantial. Put another way, the constitutionality of any particular application of the ESA take provision does not depend on adding up "a large number of small but definite [economic] impacts from each insect or plant of an endangered species" to reach a substantial effect on interstate commerce.[13] Rather, the FWS can prohibit the Cave Species takes because such regulation is essential to the efficacy of – that is, the regulation is necessary and proper to – the ESA's comprehensive scheme to preserve the nation's genetic heritage and the "incalculable" value inherent to that scarce natural resource, and because that regulatory scheme has a very substantial impact on interstate commerce.

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[13] Charles Tiefer, *After Morrison, Can Congress Preserve Environmental Laws from Commerce Clause Challenge?* 30 Envt'l L. Rep. 10888 (2000).

169 F.Supp.2d 648

United States District Court, W.D. Texas, Austin Division.

GDF REALTY INVESTMENTS, LTD., et al.

v.

Gale NORTON, et al.

No. A-00-CA-369SS.

Aug. 30, 2001

ORDER

SPARKS, District Judge.

BE IT REMEMBERED on the 30th day of August 2001 the Court reviewed the file in the above-captioned case and specifically Plaintiffs' Summary Judgment Motion and Brief in Support [#25] and defendants' opposition thereto [#31]; Defendants' Summary Judgment Motion [#30] and Memorandum of Law in Support [#31], plaintiffs' amended response thereto [#39], defendants' reply thereto [#41] and plaintiffs' supplemental letter brief [#47]. After considering the motions, responses and supplemental brief, the case file as a whole and the applicable law, the Court enters the following opinion and order.

This is a declaratory relief action and request for injunctive relief brought by plaintiffs GDF Realty Investments, Ltd., Parke Properties I, L.P. and Parke Properties II, L.P. ("plaintiffs") against defendants Gale Norton and Marshall P. Jones, in their official capacities as Secretary

of the Interior and Director of the U.S. Fish and Wildlife Service, respectively ("defendants").[1]

Factual and Procedural Background

Sometime in 1983, plaintiffs bought approximately 216 acres of undeveloped land in Travis County, Texas, near the intersection of two major state highways, FM 620 and FM 2222 ("the Property"). *See* Complaint, ¶ 30; *see also* Plaintiffs' Summary Judgment Motion, Ex. C, Affidavit of Fred Purcell ("Purcell Affidavit"), ¶¶ 1-3 and Tab 1. The Property is home to six species of invertebrates that, outside of museum and research collections, are located entirely within underground caves in Travis and Williamson Counties, in central Texas. *See, e.g.,* Plaintiffs' Summary Judgment Motion, Ex. A.[2] Shortly after buying the Property (which plaintiffs estimate has a fair market value of $60 million), plaintiffs sought to commercially develop it. *See* Purcell Affidavit, ¶¶ 3-4 ("Located at the intersection of two major highways in one of the most

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[1] Although plaintiffs originally brought this lawsuit against Bruce Babbitt and Jamie Rappaport Clark, in their respective capacities as Secretary of the Interior and Director of the Fish & Wildlife Service, defendants Norton and Jones are the current successors to these positions, following the 2000 presidential election. Accordingly, Norton and Jones, in their official capacities, are "automatically substituted" as the defendants in this lawsuit. *See* Fed.R.Civ.P. 25(d)(1).

[2] These six species are: (1) the Tooth Cave pseudoscorpion (*Microcreagis texana*); (2) the Tooth Cave spider (*Leptoneta myopica*); (3) the Bee Cave Creek harvestman (*Texella reddelli*); (4) the Tooth Cave ground beetle (*Rhadine persephone*); (5) the Kretschmarr Cave mold beetle (*Texamaurops reddelli*); and (6) the Bone Cave harvestman (*Texella reyesi*). Hereafter, the Court will collectively refer to these six species as "the Cave Species."

rapidly growing areas of Texas, the Property is an extremely valuable piece of real estate."). However, according to plaintiffs, "Defendants' land use restrictions on the Property resulting from the Endangered Species Act" have prevented plaintiffs "from making economic use of the Property." *See id.* ¶¶ 6 and 15.

In March 1985, James Reddell, assistant curator at the Texas Memorial Museum for the University of Texas, sought plaintiffs' permission to enter the Property to begin "a long-term study" of the Cave Species and other invertebrates living in the caves on the Property. *See* Purcell Affidavit, Tab 2, at FP-00234.

On September 16, 1988, the federal government, pursuant to the ESA, issued a final rule listing five of the Cave Species as endangered.[3] *See* Plaintiffs' Summary Judgment Motion, Ex. A (reprinting 53 Fed.Reg. 36029 (Sept. 16, 1988)). The final rule stated:

> Each of these species is known from only six or fewer small, shallow, dry caves near Austin in Travis and Williamson Counties, Texas. Urban, industrial and highway expansion are planned or ongoing in the area containing the cave habitat of these species. This development could result in filling or collapse of these shallow caves. . . .

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[3] The rule does not mention the Bone Cave harvestman. Although the record does not indicate when this species was placed on the endangered list, plaintiffs do not dispute it is classified as endangered by the federal government. None of the six Cave Species, however, are listed as endangered by the Texas state government. *See, e.g.*, Texas Parks and Wildlife Department, *Texas Threatened and Endangered Invertebrates, at* http://www.tpwd.state.tx.us/nature/endang/animals/invertebrates.htm (last modified Aug. 3, 2001).

See id. at 32029-30. The rule further stated that four of the species were located only in Tooth Cave, Amber Cave, and Kretschmarr Cave, all in the Jollyville Plateau in Travis County. *See id.* at 36030. These caves are located on or near the Property. *See* Purcell Affidavit, Tab 1. The rule also stated all five species had been studied and collected by several scientists since the 1960s and 1970s, and articles regarding these species had been published in national scientific publications and at least one international journal. *See* Plaintiffs' Summary Judgment Motion, Ex. A, at 36030 and 36032. The rule indicated the study of these species was ongoing, stating that one reason for listing the species as endangered was "[c]ollection [of the species] for scientific or educational purposes could become a threat if [their] localities become generally known." *See id.* at 36031. The rule stated the main reason the species were listed as endangered was "[t]he primary threat to the five species comes from potential loss of habitat owing to ongoing development activities," and that the species' caves "are in an area for which a major residential, commercial, and industrial development has been proposed." *See id.* The rule concluded:

> These species require the maximum possible protection provided by the Act because their extremely small, vulnerable habitats are within an area that can be expected to experience continued pressures from economic and population growth.

See id. at 36032.

On March 2, 1989, shortly after this final rule was issued, defendants began asserting jurisdiction over the Property, on the grounds that plaintiffs' proposed development and "commercial activities" could constitute a take

of "the endangered Texas cave invertebrates." *See* Purcell Affidavit, Tab 2, at GDF 2824-30 (letter from Fish & Wildlife Service). In response, plaintiffs stated it was their intention to donate some caves on the Property to scientific research for "one year," place fences around all the caves, and commercially develop the remainder of the Property: "[A] shopping center . . . will be constructed around Tooth Cave. Similar development will occur around the other caves to be donated." *See id.* at GDF 2906-08 (September 20, 1989 letter from plaintiffs).

Negotiations for commercial development of the Property continued between the parties for the next several years. According to plaintiffs, sometime in 1993 defendants asserted regulatory jurisdiction over plaintiffs' "clearing activities on the Property" as well as plaintiffs' "development activities on the Property," informing plaintiffs that these activities violated the ESA's take provision. *See* Purcell Affidavit, ¶ 18.

On June 2, 1994, defendants informed plaintiffs that their proposed development of the Property would cause "habitat destruction and degradation" and, as a result, "the development as proposed will, more likely than not, constitute an ESA Section 9 take of endangered species by 'killing' or 'harming' or 'harassing' individuals so as to increase the likelihood, or cause, actual injury by significantly impairing essential breeding, feeding or sheltering behaviors." *See* Purcell Affidavit, Tab 4, at 004159 (letter from Fish & Wildlife Service. Defendants stated the five species listed in the September 16, 1988 final rule, as well as the Bone Cave harvestman, likely would be taken by the proposed development. *See id.* at 004164. Defendants also noted the proposed development would include "residential housing . . . research and development facilities, a

golf course, office facilities and commercial development." *See id.* at 004159.

Negotiations between the parties regarding development of the Property continued. On December 30, 1997, plaintiffs applied for several Section 10(a) incidental take permits,[4] to develop "a shopping center, a residential subdivision, and office buildings" on the Property. *See* Purcell Affidavit, ¶ 27.[5] When defendants failed to reasonably act on these applications, plaintiffs sought judicial relief. On June 7, 1999, this Court issued an order holding that defendants had, by their inaction and through a recently-filed declaration, issued a final agency action denying plaintiffs' December 1997 applications for incidental take permits under Section 10(a). The Court found defendants had acted "totally irresponsibly" in intentionally delaying a ruling on the applications, and that defendants' conduct in so doing was "simply wrong."

According to plaintiffs, at this point defendants had "established benchmarks prohibiting any development of

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[4] Under Section 10(a), a property owner who believes his development may constitute a "take" under Section 9 can apply to the Secretary of the Interior for an "incidental take" permit, which allows "any taking otherwise prohibited by [Section 9] if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." *See* § 16 U.S.C. § 1539(a)(1)(B).

[5] In his affidavit, Purcell represents that, prior to these December 1997 Section 10(a) permit applications, defendants "had never voiced any objections to our proposed development as a threat to the Cave Bugs." *See id.* ¶ 28. However, this statement is directly contradicted by the correspondence attached to Purcell's affidavit and discussed above, including the March 1989 and June 1994 letters from defendants, both of which directly and prominently explain defendants' belief that plaintiffs' proposed development will harm the Cave Species.

the Property above certain elevation contour lines" because of harm to the Cave Species. *See* Purcell Affidavit, ¶ 33. Also according to plaintiffs, defendants' "repeated disapproval of development plans" for the Property had deprived plaintiffs of "several lucrative opportunities for the use and enjoyment of the Property," and defendants' "restrictions on our use and enjoyment of the Property has caused and continues to cause severe economic harm." *See id.* ¶¶ 30 and 36.

While still trying to get defendants to reconsider their denial of the Section 10(a) permits, plaintiffs tried another approach by filing this lawsuit on June 15, 2000, arguing for the first time that Section 9 of the ESA was unconstitutional as applied by defendants.

The premise for plaintiffs' constitutional claim is that defendants have "consistently asserted regulatory jurisdiction over the development activities on the Plaintiffs' property," on the basis that "Plaintiffs' proposed development plans will cause 'take' of the Cave Bugs in violation of § 9(a)(1)(B) of the ESA." *See* Plaintiffs' Summary Judgment Motion, at 4. Plaintiffs contend this application of Section 9 exceeds the authority granted to Congress under the Commerce Clause of the United States Constitution. Plaintiffs therefore "seek a declaration that, as-applied to the six listed endangered cave invertebrates living on or in close proximity to Plaintiffs' property, the 'take' provision of the ESA, 16 U.S.C. § 1538(a)(1)(B), is unconstitutional." *See* Complaint, ¶¶ 9 and 59. Plaintiffs also request an order "permanently enjoin[ing] the Defendants from enforcing Section 9 of the ESA as it is applied to the Cave Bugs." *See id.* ¶ 61.

Both parties now seek summary judgment. In their motion, plaintiffs ask the Court to rule defendants' application of Section 9 exceeds Congress' authority under the Commerce Clause because it does not regulate: (1) channels of interstate commerce; or (2) an activity that "substantially affects" interstate commerce. *See* Plaintiffs' Summary Judgment Motion, at 5-6. Defendants argue plaintiffs' summary judgment motion should be denied in full. In their cross-motion, defendants ask the Court to rule that "Defendants' application of Section 1568(1)(a)(B) of the Endangered Species Act in this case is constitutional, as a valid exercise of Congressional power under the Commerce Clause." *See* Defendants' Cross Motion for Summary Judgment, at 1-2.[6]

Summary Judgment Standard

Summary judgment may be granted if the moving party shows there is no genuine issue of material fact, and it is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c). In deciding summary judgment, the Court should "construe all facts and inferences in the light most favorable to the nonmoving party." *See Hart v. O'Brien,* 127 F.3d 424, 435 (5th Cir.1997), *cert. denied,* 525 U.S. 1103, 119 S.Ct. 868, 142 L.Ed.2d 770 (1999). The standard for determining whether to grant summary judgment "is not merely whether there is a sufficient factual dispute to permit the case to go forward, but whether a rational trier of fact could find for the nonmoving party

[6] Presumably, defendants meant to cite Section 1538(a)(1)(B), as that is the statute at issue in this case, and because there is no Section 1568 of the ESA, much less a Section 1568(1).

based upon the record evidence before the court." *James v. Sadler,* 909 F.2d 834, 837 (5th Cir.1990). Both parties bear burdens of producing evidence in the summary judgment process. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). However, "[n]either conclusory allegations nor unsubstantiated assertions" will satisfy either party's burden. *See Wallace v. Texas Tech Univ.,* 80 F.3d 1042, 1047 (5th Cir.1996).

Analysis

Congress may only enact laws pursuant to one of its enumerated constitutional powers. *See Marbury v. Madison,* 5 U.S. 137, 1 Cranch 137, 176, 2 L.Ed. 60 (1803). Under the Commerce Clause, Congress has the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., Art. I, § 8. Plaintiffs argue defendants' application of the ESA's take provision to the Cave Species goes beyond the scope of this power, and therefore is invalid. To succeed on this argument, plaintiffs must make a "plain showing" that defendants' application is unconstitutional. *See United States v. Morrison,* 529 U.S. 598, 120 S.Ct. 1740, 1748, 146 L.Ed.2d 658 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds.").

I. Plaintiffs' As-Applied Challenge

This lawsuit involves an as-applied constitutional challenge to the ESA's take provision.[7] *See, e.g.,* Complaint, ¶ 9 ("Plaintiffs seek a declaration that, as-applied to the six listed endangered cave invertebrates living on or in close proximity to Plaintiffs' property, the 'take' provision of the ESA, 16 U.S.C. § 1538(a)(1)(B), is unconstitutional."); *see also* Defendants' Summary Judgment Motion, at 1-2 (seeking ruling that "Defendants' application of Section 1568(1)(a)(B) of the Endangered Species Act in this case is constitutional."). As plaintiffs repeatedly make clear, they are not raising a facial constitutional challenge in this lawsuit.[8] *See, e.g.,* Plaintiffs' Response [#39], at 18

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[7] For purposes of this lawsuit, there is no dispute that plaintiffs' proposed development of the Property would constitute a take of the Cave Species. *See, e.g.,* Plaintiffs' Summary Judgment Motion, at 10-11; Plaintiffs' Response, at 14 and n. 14. The ESA's take provision, also referred to as Section 9 of the ESA, makes it unlawful to "take" any endangered species. *See* 16 U.S.C. § 1538(a)(1)(B). The federal rules adopted for the ESA have defined "take" to include "significant habitat modification or degradation [that] actually kills or injures wildlife by significantly impairing essential behavioral patterns including breeding, feeding or sheltering." *See* 50 C.F.R. § 17.3. The record indicates defendants are applying this latter regulation, known as the "habitat modification" regulation, to plaintiffs' proposed development of the Property. *See, e.g.,* Complaint, ¶ 27; Purcell Affidavit, Tab 4, at 004159 and 004166; Plaintiffs' Response, at 10 n. 9. The Supreme Court has expressly upheld 50 C.F.R. § 17.3 on its face, as being a reasonable interpretation of the ESA. *See Babbitt v. Sweet Home Chapter of Communities of Great Or.,* 515 U.S. 687, 115 S.Ct. 2407, 132 L.Ed.2d 597 (1995).

[8] A facial challenge seeks to invalidate a particular regulation "in every circumstance." *See Sweet Home,* 115 S.Ct. at 2414; *see also United States v. Salerno,* 481 U.S. 739, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987) ("A facial challenge is ... the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."); *Stenberg v.*

(Continued on following page)

("[T]his is not a facial challenge to the take provision; thus the constitutionality of Congress' act is not at issue. . . . [T]his case is not a facial challenge to the take provision, much less to the ESA as a whole.").[9]

Carhart, 530 U.S. 914, 120 S.Ct. 2597, 2655, 147 L.Ed.2d 743 (2000) (Thomas, J., dissenting) ("The only question [in a facial challenge] is whether [defendant] has shown that no set of circumstances exists under which the Act would be valid.") (internal quotations and citation omitted).

[9] Plaintiffs wisely do not raise a facial challenge. The ESA's take provision and 50 C.F.R. § 17.3 are essential parts of a larger statute reasonably enacted to regulate activities substantially affecting interstate commerce, including: balancing "economic growth and development" against preserving endangered species; preserving a natural resource that has "esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people"; and preserving the potential resources found in *every* species, including their genetic information. *See, e.g.*, 16 U.S.C. § 1531(a); *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 98 S.Ct. 2279, 2298, 57 L.Ed.2d 117 (1978) ("*TVA*") ("[T]he plain language of the Act, buttressed by its legislative history, shows clearly that Congress viewed the value of endangered species as 'incalculable.' "); *Bennett v. Spear*, 520 U.S. 154, 117 S.Ct. 1154, 1168, 137 L.Ed.2d 281 (1997) ("economic consequences are an explicit concern of the ESA"). Thus, these regulations would easily survive a facial Commerce Clause challenge. *See, e.g., Gibbs v. Babbitt*, 214 F.3d 483, 497 (4th Cir.2000), *cert. denied*, 531 U.S. 1145, 121 S.Ct. 1081, 148 L.Ed.2d 957 (2001) ("Congress undoubtedly has the constitutional authority to pass legislation for the conservation of endangered species."); *National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1057 (D.C.Cir.1997), *cert. denied*, 524 U.S. 937, 118 S.Ct. 2340, 141 L.Ed.2d 712 (1998) ("*NAHB*") ("We hold that section 9(a)(1) of the Endangered Species Act is within Congress' Commerce Clause power."). *Cf. Hodel v. Indiana*, 452 U.S. 314, 101 S.Ct. 2376, 2386 n. 17, 69 L.Ed.2d 40 (1981) ("It is enough that the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfies this test [of being rationally related to regulating interstate commerce]."); *United States v. Mitchell*, 553 F.2d 996, 1002 (5th Cir.1977) ("The nature of such a bill [the Marine Mammal Protection Act] is based on the control that a sovereign

(Continued on following page)

A Commerce Clause challenge focuses on the activity being regulated, and its relation to interstate commerce. *See United States v. Lopez,* 514 U.S. 549, 115 S.Ct. 1624, 1629-30, 131 L.Ed.2d 626 (1995). In an as-applied Commerce Clause challenge, the regulated activity is defined in terms of, and thus is limited to, the specific facts of the case. *See, e.g., NAHB,* 130 F.3d at 1059 (Henderson, J., concurring) (denying as-applied constitutional challenge because "application of Section 9 of ESA here acts to regulate commercial development of the land inhabited by the endangered species"); *see also Jones v. United States,* 529 U.S. 848, 120 S.Ct. 1904, 1909, 146 L.Ed.2d 902 (2000) (framing as-applied Commerce Clause challenge as "whether [the statute's] application to the private residence in the present case is constitutional"); *Lopez,* 115 S.Ct. at 1630 (citing *Wickard v. Filburn,* 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942), a Commerce Clause challenge to federal Act governing wheat quotas, as "sustaining the application of the Act to Filburn's activity" of home consumption); *United States v. Jimenez,* 256 F.3d 330, 337 (5th Cir.2001) (as-applied Commerce Clause challenge "turns on whether the property was used in an activity affecting interstate commerce"); *United States v. Kallestad,* 236 F.3d 225, 228 (5th Cir.2000) (analyzing specific conduct of defendant for purposes of as-applied Commerce Clause challenge); *United States v. Corp,* 236 F.3d 325, 332-33 (6th Cir.2001) (as-applied Commerce Clause challenge is "a determination on a case-by-case basis about

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such as the United States has over the natural resources within its territory. It can exploit them or preserve them or establish a balance between exploitation and preservation.").

whether the activity involved in a certain case had a substantial effect on commerce"); *United States v. Dorris,* 236 F.3d 582, 586 (10th Cir.2000), *cert. denied,* 532 U.S. 986, 121 S.Ct. 1635, 149 L.Ed.2d 495 (2001) ("[T]he challenge [in *Jones*] was as applied rather than facial, as it is here. The Court in *Jones* considered the connection of a specific home to interstate commerce and found it wanting."). Here, the regulated activity is plaintiffs' alleged take of the Cave Species through their proposed commercial development of the Property. *Cf. Sweet Home,* 115 S.Ct. at 2412 (describing specific conduct regulated by take provision as "logging activities" destroying habitat of two endangered species).

A fundamental flaw in plaintiffs' argument is their overly-broad definition of the regulated activity at issue. Plaintiffs seek to invalidate the take provision as applied to all "takes" of the Cave Species. *See, e.g.,* Plaintiffs' Brief, at 2 ("Plaintiffs contend that the regulated activity – *takes* of the Cave Bugs – cannot be supported by the Commerce Clause.") (emphasis added); Plaintiffs' Summary Judgment Motion, at 6 ("Congress lacks authority under the Commerce Clause to regulate *takes* of the Cave Bugs on the Property.") (emphasis added); Plaintiffs' Response, at 18 ("This case presents the substantially more narrow question of whether the take provision can be constitutionally applied to the Cave Bugs."). But this lawsuit does not involve all takes of the Cave Species, or even all takes of the Cave Species on the Property. Rather, this case involves defendants' regulation of one specific take – the

alleged take of the Cave Species by plaintiffs' proposed commercial development of the Property.[10]

Allowing plaintiffs to challenge the constitutionality of Section 9 as-applied to takes of the Cave Species in general, rather than plaintiffs' specific conduct, contradicts "the general rule that constitutional adjudication requires a review of the application of a statute to the conduct of the party before the Court." *Members of City Council v. Taxpayers for Vincent,* 466 U.S. 789, 104 S.Ct. 2118, 2125, 80 L.Ed.2d 772 (1984). A plaintiff can either challenge *all* applications of a statute (*i.e.,* a facial challenge), or the statute as-applied to the plaintiff's particular conduct – but he cannot take the middle ground and challenge the statute as-applied to a general class of activity into which his conduct also falls. *See, e.g., ABATE of Georgia, Inc. v. Georgia,* 137 F.Supp.2d. 1349, 1355 (N.D.Ga.2001) ("[A]s-applied challenges are fact-specific. They cannot be brought on behalf of a class; they must be brought on a case-by-case basis."). This principle stems from the basic rule that a court may decide only the actual case or controversy that is before it:

> This Court, as is the case with all federal courts, has no jurisdiction to pronounce any statute, either of a state or of the United States, void, because

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[10] This is not a case where a federal regulation has been enacted applying Section 9 to every possible take of the Cave Species. *Cf. Gibbs,* 214 F.3d 483 (overruling facial Commerce Clause challenge to 50 C.F.R. § 17.84, which prohibits taking of all red wolves). Nor is it a case where plaintiffs are challenging the federal regulation listing the Cave Species as endangered. *Cf. Building Indus. Ass'n of Superior Cal. v. Babbitt,* 979 F.Supp. 893 (D.D.C.1997) (overruling facial Commerce Clause challenge to listing of fairy shrimp as endangered).

> irreconcilable with the constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by . . . . the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional. . . . The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined.

United States v. Raines, 362 U.S. 17, 80 S.Ct. 519, 523, 4 L.Ed.2d 524 (1960). In sum, plaintiffs cannot challenge Section 9 as-applied to takes of the Cave Species in general.[11] They may challenge Section 9 as-applied only to *their* alleged take. Thus, as stated, the regulated activity in this lawsuit is plaintiffs' alleged take of the Cave Species through their proposed commercial development of the Property.

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[11] In framing their challenge in this manner, plaintiffs make the same mistake as the dissent in *NAHB,* which argues the take provision is unconstitutional as applied to "killing flies" and as applied in the abstract to "controlling weeds or digging holes." *See, e.g., NAHB,* 130 F.3d at 1064 (Sentelle, J., dissenting). As noted, however, this argument runs against the well-established rule that a plaintiff may constitutionally challenge either the application of a statute to *his own conduct,* or he may argue the statute, on its face, does not constitutionally apply to *any* conduct – he may not strike down the statute as unconstitutionally applied to some abstract class or subset of conduct.

II. Commerce Clause Analysis

Two recent Supreme Court decisions, *United States v. Lopez,* 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) and *United States v. Morrison,* 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000), provide the starting point for analyzing whether defendants' application of Section 9 to plaintiffs' alleged take is a valid exercise of the Commerce Clause power. Although both cases involve facial constitutional challenges, they establish the general rule that the Commerce Clause allows regulation of three "broad categories" of activity: (1) use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce; and (3) activities that substantially affect interstate commerce. *See Lopez,* 115 S.Ct. at 1629-30; *Morrison,* 120 S.Ct. at 1749. The Court finds the regulated activity in this case easily falls under the third category.[12]

In *Morrison,* the Supreme Court set forth four "considerations" in determining whether the activity being regulated substantially affects interstate commerce. The Fifth Circuit has defined these considerations as follows:

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[12] The Court therefore need not, and does not, analyze whether the regulated activity also falls under the first and second categories. With respect to the first category, however, the Court does note that the Property is located at the corner of two major state highways that are both directly connected to Interstate Highway 35, and plaintiffs' proposed development would affect these highways. *Cf. Caminetti v. United States,* 242 U.S. 470, 37 S.Ct. 192, 197, 61 L.Ed. 442 (1917) ("[T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.").

> (1) whether the statute regulates 'commerce,' or an activity that might be deemed an 'economic activity,' broadly defined;
>
> (2) whether the statute has an 'express jurisdictional element' that restricts its application to activities that have 'an explicit connection with or effect on interstate commerce';
>
> (3) whether congressional findings support the judgment that the activity in question has a substantial effect on interstate commerce; and
>
> (4) whether the act made an offense has an attenuated relationship to that substantial effect on interstate commerce.

Kallestad, 236 F.3d at 227-28 (quoting *Morrison,* 120 S.Ct. at 1749-51).

It is questionable whether these four considerations apply in this case. Courts applying the *Morrison* considerations have done so in cases involving facial Commerce Clause challenges. *See Kallestad,* 236 F.3d at 228; *Gibbs,* 214 F.3d 483; *NAHB,* 130 F.3d at 1057.[13] In purely as-applied Commerce Clause challenges, the courts have analyzed only the effect of the specific activity on interstate commerce. *See Jimenez,* 256 F.3d at 339 (finding

[13] The procedural posture of *NAHB* is not entirely clear. While the majority makes reference to an as-applied challenge, in fact it analyzes only whether the take provision is constitutional on its face, under the Commerce Clause. Answering this question in the affirmative, it then concludes any application of the take provision (and therefore the particular application before it) is constitutional. The concurring opinion first concludes the take provision as a whole is constitutional, then concludes the application to the particular conduct at issue – building a hospital – is constitutional.

specific home office being regulated "would easily be classified as substantially affecting interstate commerce," without applying *Morrison* considerations). *Cf. Jones,* 120 S.Ct. at 1910 (finding "home owned and occupied by petitioner Jones's cousin was not so used [in interstate commerce, as defined by statute] – it was a dwelling place used for everyday family living," without applying *Morrison* considerations). The Court finds that, under either approach, defendants' application of the take provision passes Commerce Clause muster.

A. Effect of Specific Activity on Interstate Commerce

As noted, the regulated activity in this case is plaintiffs' alleged take of the Cave Species by their planned development of the Property. This development includes plans to build "a shopping center, a residential subdivision, and office buildings" on the Property. *See* Purcell Affidavit, ¶ 27. It also includes plaintiffs' proposal to build a Wal-Mart and an apartment complex on the Property. *See* Defendants' Summary Judgment Motion, Ex. 1. This activity, standing alone, "would easily be classified as substantially affecting interstate commerce." *See Jimenez,* 256 F.3d at 339 (upholding application of federal arson statute to single home office; finding home office substantially affected interstate commerce because it was primary location of a small construction business with gross receipts of $20,000 per month and payroll of $8,000 per month, and was location of business records and company vehicles); *NAHB,* 130 F.3d at 1059 (Henderson, J., concurring) (upholding application of take provision to "proposed redesigned traffic intersection and the hospital which it is intended to serve, each of which has an obvious connection with interstate commerce"). *Cf. Russell v. United States,*

471 U.S. 858, 105 S.Ct. 2455, 2457, 85 L.Ed.2d 829 (1985) ("The rental of real estate is unquestionably such an activity [that affects commerce].").

Plaintiffs mistakenly focus only on the commercial aspects (or, in their view, the complete lack thereof) of the Cave Species. However, the activity regulated in this case is not simply the Cave Species. It is an alleged take of the Cave Species through plaintiffs' development of the Property. Plaintiffs cannot simply ignore the commercial nature of their activity. *See, e.g., Groome Res., Ltd. v. Parish of Jefferson,* 234 F.3d 192, 204 (5th Cir.2000) (indicating regulated activity is examined in terms of the "actors" and the "conduct" being regulated) (quoting *Morrison,* 120 S.Ct. at 1750).[14] Indeed, plaintiffs themselves repeatedly describe

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[14] This is similar to another problem underpinning the *NAHB* dissent – the primary authority relied on by plaintiffs. Specifically, the dissent in *NAHB* acknowledges the "activity regulated in the present case" as being "local land-use" and "involv[ing] the application of the ESA to the building of a hospital and supporting infrastructure," but concludes this activity is not "commercial." *See NAHB,* 130 F.3d at 1064-66. This ignores the plain fact that a hospital, its construction, and the re-design of the adjacent traffic intersection are all commercial activities. For this and several other reasons, the dissent in *NAHB* is wholly unpersuasive. *See also* John C. Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly,* 97 MICH.L.REV. 174 (1998) (explaining, in a well-reasoned article, the flaws in the *NAHB* dissent). Indeed, accepting plaintiffs' argument – that the Court should examine only the intrastate, non-economic nature of the Cave Species – likely would nullify the take provision as-applied in *TVA,* the primary Supreme Court decision on the ESA. In *TVA,* the ESA was applied to enjoin federal construction of a dam, to prevent the "destruction or modification of [the] habitat area" of the endangered snail darter fish. *See TVA,* 98 S.Ct. at 2286. The non-commercial snail darter, however, was located solely within Tennessee: "[T]he snail darter apparently lives only in that portion of the Little Tennessee River [an area near Knoxville] which would be completely inundated by the reservoir

(Continued on following page)

defendants' application of the take provision in terms of the planned development of the Property. *See, e.g.,* Plaintiffs' Summary Judgment Motion, at 4 (stating defendants have "consistently asserted regulatory jurisdiction over the development activities on the Plaintiffs' property," on the basis that "Plaintiffs' proposed development plans will cause 'take' of the Cave Bugs in violation of § 9(a)(1)(B) of the ESA.").

Plaintiffs also contend the focus should not be on their planned commercial development of the Property because this type of activity is "not addressed by the express terms" of the take provision. *See* Plaintiffs' Response, at 11-12. However, the take provision broadly applies to any habitat modification that actually injures or kills endangered species by significantly impairing their essential behavioral patterns. Thus, it unquestionably covers commercial developments that have this effect. Indeed, one of the express purposes of the ESA is to prevent such developments from extinguishing endangered species. *See* 16 U.S.C. § 1531(a) (finding ESA was needed to protect species from being "rendered extinct by economic growth and development").[15]

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created as a consequence of the Tellico Dam's completion." *Id.* at 2285. In addition, adopting this argument would turn the ESA on its head: "According to plaintiffs, if a species is abundant and scattered plentifully across state lines, Congress is fully empowered under the Commerce Clause to protect it. But when that same species becomes more scarce and its population reduced to a single state, Congress's hands are suddenly tied." *Building Indus. Ass'n of Superior Cal.,* 979 F.Supp. at 907-08.

[15] Thus, plaintiffs' citation to *Solid Waste Agency of No. Cook County v. United States Army Corps of Eng'rs,* 531 U.S. 159, 121 S.Ct.

(Continued on following page)

Moreover, because the regulated activity in this case is economic in nature, the Court may aggregate the effects of similar activity for the purpose of determining the effect on interstate commerce. *See Morrison,* 120 S.Ct. at 1750 n. 4 (noting "the *Wickard* aggregation principle" applies when "the regulated activity was of an apparent commercial character"); *Jimenez,* 256 F.3d at 338; *United States v. Gray,* 260 F.3d 1267, 1274, n. 2 (11th Cir.2001) ("Under the aggregation theory, economic activity that may not itself substantially affect interstate commerce may be regulated under the Commerce Clause if that conduct, in the aggregate, would have such a substantial effect."). Under this principle, it is obvious that the effect of building Wal-Marts and apartment complexes, in the aggregate, quite substantially affects interstate commerce.

Finally, merely because a federal regulation is designed to *restrict* interstate commerce does not render the regulation unconstitutional. A regulation restricting commerce is still a regulation affecting commerce. *See, e.g., Gibbs,* 214 F.3d at 495 ("It is well-settled under Commerce Clause cases that a regulation can involve the

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675, 148 L.Ed.2d 576 (2001) is misplaced. Plaintiffs contend the Supreme Court in that case was "highly skeptical" of the government's argument that "a municipal landfill" fell within the Clean Water Act's regulation of "navigable waters." *See* Plaintiffs' Response, at 12. Whether this is true or not, it has no bearing here. A "proposed commercial development" is indisputably within the type of activity Congress intended to be regulated by the ESA and the take provision. The *Solid Waste* dicta cited by plaintiffs is therefore inapplicable in this case. *Cf. Solid Waste,* 121 S.Ct. at 684 ("[W]e find nothing approaching a clear statement from Congress that it intended [the Clean Water Act] to reach an abandoned sand and gravel pit such as we have here.").

promotion or the restriction of commercial enterprises and development.").

In sum, the Court finds defendants' application of the take provision in this case is a constitutional exercise of the Commerce Clause power, because the activity being regulated, both standing alone or under the aggregation principle, would easily be classified as substantially affecting interstate commerce.[16]

B. Application of *Morrison* Considerations

1. Economic Nature of Regulated Activity

Assuming the *Morrison* considerations fully apply to an as-applied challenge, the first inquiry is into "the economic nature of the regulated activity." *See Groome,* 234 F.3d at 204. The Supreme Court has established a fairly low hurdle here, indicating a regulated activity will

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[16] In addition, the Court finds a genuine fact issue exists as to whether the regulated activity in this case also substantially affects the interstate scientific research market. *See Gibbs,* 214 F.3d at 494 ("Scientific research generates jobs."). The summary judgment evidence indicates scientists across the country have studied the Cave Species and transported them to/from the American Museum of Natural History in New York, the California Academy of Sciences, the Academy of Natural Sciences in Philadelphia, the Field Museum of Natural History in Chicago, and the Texas Memorial Museum. *See* Defendants' Summary Judgment Motion, Ex. 3, Tab B, at 157, 207-11 and 221; Tab C, at 242 and 249. The Cave Species were listed as endangered in part because "[c]ollection [of the species] for scientific or educational purposes could become a threat if [their] localities become generally known." *See* 53 Fed.Reg. at 36031. However, because this issue is independent from the grounds on which the Court grants summary judgment for defendants, it is unnecessary to preserve the issue for trial.

be considered non-economic only if it has "nothing to do with commerce or any sort of economic enterprise, however broadly one might define those terms." *Morrison,* 120 S.Ct. at 1749; *see also id.* at 1750-51 (stating regulated activity need only be "some sort of economic endeavor" or be economic "in any sense of the phrase"); *Groome,* 234 F.3d at 208 ("[T]he *Morrison* Court provided an expansive reading of economic activity that affected interstate commerce, including as it did *Wickard's* regulation of homegrown and home-consumed wheat."). Similarly, the Fifth Circuit has stressed "[t]his circuit has also recognized a broad reading of commercial and economic activities under the Commerce Clause." *Id.; see also United States v. Bailey,* 115 F.3d 1222, 1228 n. 7 (5th Cir.1997), *cert. denied,* 522 U.S. 1082, 118 S.Ct. 866, 139 L.Ed.2d 764 (1998) ("The construction of the term 'commerce' is a practical one and embraces economic activity beyond that which is traditionally considered commerce."). Finally, the Fifth Circuit has indicated "the economic nature of the regulated activity" may be examined in terms of whether "the 'actors' [or] the 'conduct' of the regulation has a commercial character." *See Groome,* 234 F.3d at 204 (quoting *Morrison,* 120 S.Ct. at 1750).[17]

Plaintiffs' alleged take of the Cave Species by their planned development of the Property clearly qualifies as economic activity. Activity doesn't get much more economic or commercial in character than building a Wal-Mart,

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[17] Thus, the inquiry is not limited "only to the terms of the statute," as plaintiffs contend. *See* Plaintiffs' Response, at 12. This is particularly true when, as here, there is no facial challenge to a statute or regulation.

office buildings, and an apartment complex. The regulated activity at issue in this case clearly passes the first *Morrison* consideration.

2. Jurisdictional Element

The second *Morrison* consideration is whether the statute has an "express jurisdictional element" that restricts its application to activities that have "an explicit connection with or effect on interstate commerce." Neither the take provision nor 50 C.F.R. § 17.3 have such a jurisdictional element. However, because this is not a facial challenge, a jurisdictional element is not required, and likely is not even applicable. *See United States v. Bird,* 124 F.3d 667, 676 n. 8 (5th Cir.1997), *cert. denied,* 523 U.S. 1006, 118 S.Ct. 1189, 140 L.Ed.2d 320 (1998) ("In any event, jurisdictional elements do not necessarily preclude 'as-applied' Commerce Clause challenges."). In addition, because of the obvious economic and interstate nature of the specific activity being regulated in this case, the jurisdictional element inquiry is not relevant. *See Groome,* 234 F.3d at 211 ("We do note, however, that the requirement of a jurisdictional element in both *Morrison* and *Lopez* is relevant only because there was no obvious interstate economic connection in those cases.").

3. Legislative History

The third consideration under the *Morrison* analysis is whether legislative history supports a judgment that the activity in question has a substantial effect on interstate commerce. *See Groome,* 234 F.3d at 211. The Fifth Circuit has stated this factor is relevant primarily when the regulated activity "deal[s] with an invisible effect" on

interstate commerce. *See id.* In addition, as plaintiffs acknowledge in their summary judgment brief, "formal findings by Congress are not required" for a valid Commerce Clause regulation. *See* Plaintiffs' Brief in Support, at 5.

As discussed, the regulated activity in this case clearly does not deal with some "invisible effect" on interstate commerce. Therefore, this consideration is not particularly relevant here. In any event, the legislative history of the ESA contains ample findings demonstrating a relationship between the take provision and interstate commerce. The ESA findings state that the Act was passed to address "various species of wildlife . . . [that] have been rendered extinct by economic growth and development." *See* 16 U.S.C. § 1531(a).[18] The findings also state the ESA was designed to protect the "value" of all species as a natural and commercial resource, because of their "esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." *See id.* Quoting from the legislative history, the Supreme Court described the following as "[t]ypifying the sentiments" of Congress in enacting the ESA:

> The value of [our] genetic heritage is, quite literally, *incalculable.* From the most narrow possible point of view, it is in the best interests of mankind to minimize the losses of genetic variations.

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[18] A similar justification was given for listing the Cave Species as endangered. *See* 53 Fed.Reg. 36029, 36031 (Sept. 16, 1998) ("The primary threat to the five species comes from potential loss of habitat owing to ongoing development activities."); *see also* Texas Parks and Wildlife Department, *Texas Threatened and Endangered Invertebrates, at* http://www.tpwd.state.tx.us/nature/endang/animals/kretscv.htm (last modified Dec. 10, 1999) (stating that "primary threat" to Cave Species is "the loss of habitat due to urban development").

> The reason is simple: *they are potential resources.* Who knows, or can say, what potential cures for cancer or other scourges, present or future, may lie locked up in the structures of plants which may yet be undiscovered, much less analyzed?

TVA, 98 S.Ct. at 2293-94 (quoting H.R.Rep. No. 93-412, at 4-5, U.S.Code Cong. & Admin.News 1973, p. 3001 (1973)) (emphasis added). The Supreme Court also noted Congress' intent, in passing the ESA, to strike a balance between economic growth and protecting endangered species (albeit a balance heavily in favor of the latter):

> Quite obviously, it would be difficult for a court to balance the loss of a sum certain – even $100 million – against a congressionally declared 'incalculable' value, even assuming we had the power to engage in such a weighing process, which we emphatically do not. . . . Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities.

TVA, 98 S.Ct. at 2298-2302.

The Court joins every other federal court to examine the issue, and concludes these findings have a rational basis.[19] *See, e.g., Gibbs,* 214 F.3d at 496 ("The full payoff of conservation in the form of tourism, research, and trade may not be foreseeable. Yet it is reasonable for Congress to

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[19] "The court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding." *Hodel v. Virginia Surface Mining & Reclamation Ass'n. Inc.*, 452 U.S. 264, 101 S.Ct. 2352, 2360, 69 L.Ed.2d 1 (1981).

decide that conservation of species will one day produce a substantial commercial benefit to this country and that failure to preserve a species will result in permanent, though unascertainable, commercial loss."); *NAHB,* 130 F.3d at 1050 ("The Committee Reports on the ESA reveal that one of the primary reasons that Congress sought to protect endangered species from 'takings' was the importance of the continued availability of a wide variety of species to interstate commerce."). Accordingly, the Court finds this third *Morrison* consideration weighs heavily against plaintiffs' claim that the take provision is unconstitutional as-applied in this case.

4. Attenuation of Relationship to Interstate Commerce

The final consideration under *Morrison* is an examination of whether the link between the regulated activity and interstate commerce is direct or attenuated. *See Groome,* 234 F.3d at 214-15. While the regulated activities in *Lopez* (mere possession of a gun near a school) and *Morrison* (committing a violent crime against a woman) required several logical links to connect the activities to some effect on interstate commerce, here the link is direct. Indeed, the Court is hard-pressed to find a more direct link to interstate commerce than a Wal-Mart.

Plaintiffs argue "the activity causing the take (land clearing and runoff from the development of the Plaintiffs' property) . . . [is] *very* distantly removed from the actual take of the species." *See* Plaintiffs' Response, at 14 (emphasis in original). More specifically, plaintiffs contend the link between the development of the Property and the take of the Cave Species is attenuated because (1) the development causes runoff which (2) filters through the ground

and then (3) "migrates through subterranean connections" until (4) it reaches the caves and (5) modifies the Cave Species' habitat. Under this view, every link is attenuated. As a practical and realistic matter, however, the courts treat development activities such as plaintiffs' as the direct cause of a take. *See, e.g., Sweet Home,* 115 S.Ct. at 2412 (assuming "logging activities . . . will have the effect, even though unintended, of detrimentally changing the natural habitat of both [endangered] species"). In addition, the final rule listing the Cave Species as endangered states that "road, industrial, residential, and commercial developments that would adversely affect these species have already begun." *See* 53 Fed.Reg. at 36031. It is these activities that directly harm the species.

In sum, the Court finds defendants' application of the take provision in this lawsuit is a valid regulation of an activity that substantially affects interstate commerce, and therefore is a valid exercise of the Commerce Clause power. Defendants' summary judgment motion is granted in full.

III. Federalism Concerns

Finally, the Court must address plaintiffs' concerns that upholding defendants' application of the take provision in this case will undermine our system of federalism. *See, e.g., Groome,* 234 F.3d at 215 (noting "the central concern of federalism as articulated in *Lopez* and *Morrison* – namely that federalizing certain spheres of authority blurs the federal/state distinction"). Plaintiffs contend allowing defendants to apply the take provision here will undermine the "traditional state authority" to regulate wildlife and land use. *See* Plaintiffs' Brief, at 17-19. While

these are certainly valid concerns, they do not compel a different result here.

First, despite plaintiffs' contention, wildlife conservation has long been regulated by both states and the federal government. *See, e.g.,* Eagle Protection Act of 1940, 16 U.S.C. § 668; Wilderness Act of 1964, 16 U.S.C. § 1131; Marine Mammal Protection Act of 1972, 16 U.S.C. § 1361; Lacey Act of 1981, 16 U.S.C. § 3371. *See also Minnesota v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172, 119 S.Ct. 1187, 1204, 143 L.Ed.2d 270 (1999) ("Although States have important interests in regulating wildlife and natural resources within their borders, this authority is shared with the Federal Government when the Federal Government exercises one of its enumerated constitutional powers."). Second, while local land use and zoning is generally an area of state concern, "[i]t is well established that Congress can regulate even private land use for environmental and wildlife conservation." *Gibbs,* 214 F.3d at 500; *see also Groome,* 234 F.3d at 216 (upholding federal regulation of local land use through Fair Housing Amendments Act, because "it does not serve the balance of federalism to allow local communities to discriminate against the disabled").

Thus, while defendants' application of the take provision implicates two areas of law often regulated by the states, these areas are not exclusive arenas of state regulation. *Cf. Morrison,* 120 S.Ct. at 1754 ("The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States."). Rather, the states and the federal government share regulation of these areas. And, where preserving endangered species is concerned, the Supreme

Court has indicated that federal law may trump state regulations in both areas. *See Sweet Home,* 115 S.Ct. 2407 (upholding regulatory interpretation of ESA take provision, which protected wildlife on purely private lands, as reasonable interpretation of Congress' intent under the ESA). This Court will not hold otherwise.

Conclusion

The take provision of the Endangered Species Act may not be the ideal federal statute. By its broad terms, it certainly covers purely local, intrastate activities having no connection whatsoever with interstate commerce. But that is not how the take provision has been applied here. The activity regulated in this case is clearly connected to interstate commerce.

Plaintiffs understandably are frustrated by defendants' conduct.[20] Defendants may have applied the take provision to plaintiffs in an unreasonable manner. That, however, does not make defendants' application *unconstitutional,* which is the only issue in this lawsuit. Similarly, plaintiffs may disagree with defendants' decision to apply the take provision in a manner that overwhelmingly favors species preservation at the expense of important local development. However, the Supreme Court has been "emphatic" that the courts are not the place for this balancing. *See TVA,* 98 S.Ct. at 2298. Plaintiffs' commercial development activities clearly fall within the broad

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[20] Indeed, the Court has already found defendants' conduct in handling plaintiffs' Section 10(a) permit applications was "totally irresponsible" and "simply wrong."

reach of the ESA's take provision. If plaintiffs are unhappy with the scope of this thirty-year old statute, they must turn to Congress for relief.

The Commerce Clause certainly has limits. But those limits are not implicated in this lawsuit. The regulated activity at issue here substantially affects interstate commerce. Accordingly, defendants are entitled to summary judgment on all plaintiffs' claims.

In accordance with the foregoing:

IT IS ORDERED that Plaintiffs' Summary Judgment Motion [#25] is DENIED;

IT IS FURTHER ORDERED that Defendants' Summary Judgment Motion [#30] is GRANTED; and

IT IS FINALLY ORDERED all remaining pending motions are DISMISSED AS MOOT.[21]

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[21] In this opinion and order, the Court has in no way relied on the amicus briefs submitted by the National Wildlife Foundation or by the Pacific Legal Foundation and Texas Justice Foundation, and has not relied on the Declaration of Darrell Ubick, which plaintiffs seek to strike.

2004 WL 396975
362 F.3d 286

United States Court of Appeals,
Fifth Circuit.

GDF REALTY INVESTMENTS, LTD.;
Parke Properties I, LP; Parke Properties II, LP,
Plaintiffs-Appellants,

v.

Gale A. NORTON, Secretary, U.S. Department of the Interior; Marshall P. Jones, Director, U.S. Fish & Wildlife Service, Defendants-Appellees.

No. 01-51099.

Feb. 27, 2004.

Appeal from the United States District Court for the Western District of Texas; Sam Sparks, Judge.

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion *March 26, 2003, 5th Cir., 326 F.3d 622*)

Before *DAVIS*, *BARKSDALE* and *DENNIS*, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R.APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

EDITH H. JONES, Circuit Judge, joined by *E. GRADY JOLLY*, *JERRY E. SMITH*, *DeMOSS*, *EDITH BROWN CLEMENT* and *PICKERING*, Circuit Judges, dissenting from the denial of rehearing en banc:

A majority of the court has refused to rehear this significant Endangered Species Act case *en banc*. I respectfully dissent. For the sake of species of 1/8-inch-long cave bugs, which lack any known value in commerce, much less interstate commerce, the panel crafted a constitutionally limitless theory of federal protection. Their opinion lends new meaning to the term *reductio ad absurdum*.

The panel holds that because "takes" of the Cave Species ultimately threaten the "interdependent web" of all species, their habitat is subject to federal regulation by the Endangered Species Act. Such unsubstantiated reasoning offers but a remote, speculative, attenuated, indeed more than improbable connection to interstate commerce. Chief Justice Marshall stated in *Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264, 5 L.Ed. 257 (1821), that Congress has no general right to punish murder or felonies generally. Surely, though, there is more force to an "interdependence" analysis concerning humans, and thus a more obvious series of links to interstate commerce, than there is to "species." Yet the panel's "interdependent web" analysis of the Endangered Species Act gives these subterranean bugs federal protection that was denied the school children in *Lopez* and the rape victim in *Morrison*. The panel's commerce clause analysis is in error.

I. Background

To recap the facts, this case involves a 20-year effort to develop a large tract of land west of Austin, Texas. This once-rural property contains a cluster of limestone caves. After obtaining all necessary state and local permits, the landowner-appellants began commercial development. Between 1988 and 1993, however, the United States Fish

and Wildlife Service ("FWS"), designated six species ("Cave Species") of tiny bugs, which dwell solely in the caves and never emerge on the surface of the land, as endangered under section 4 of the ESA. *See* 16 U.S.C. § 33(a)(1). Pursuant to section 9(a)(1) of the ESA, it became unlawful to take a member of the endangered species. A "take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect. . . . " 16 U.S.C. § 1532(19). The ESA broadly defines "harm" as including significant modifications or degradations of a habitat which kill or injure protected wildlife "by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3.

After years of wrangling with and attempting to appease the FWS, the landowners remained unable to commercially develop their land. Accordingly, they sued on the theory that the ESA "take" provision is unconstitutional as applied to these Cave Species. The district court granted summary judgment to FWS, finding that it would be "hard-pressed to find a more direct link to interstate commerce than a Wal-Mart." *GDF Realty Investments, Ltd. v. Norton,* 169 F.Supp.2d 648, 662 (W.D.Tex.2001). On appeal, the panel affirmed the district court's judgment on wholly different grounds.

II. Discussion

Congress's power "to regulate commerce . . . among the several states . . . " is, like all enumerated powers, subject to outer limits. *See United States v. Lopez,* 514 U.S. 549, 556-57, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers,* 531 U.S. 159, 173, 121 S.Ct. 675, 148 L.Ed.2d

576 (2001) (reiterating that "the grant of authority to Congress under the commerce clause, though broad, is not unlimited"). The commerce clause "may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *NLRB v. Jones and Laughlin Steel,* 301 U.S. 1, 37, 57 S.Ct. 615, 81 L.Ed. 893 (1937).

It is unnecessary to recapitulate the Supreme Court's *Lopez* and *Morrison* cases at any length. *See, generally, United States v. Morrison,* 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000). *Lopez* defines three categories of federal regulation that are consistent with the commerce clause. *Lopez,* 514 U.S. at 558, 115 S.Ct. 1624. At issue here is whether federal regulation of the Cave Species is permissible under the third *Lopez* category – i.e., whether takes of the Cave Species "substantially affect interstate commerce." *Lopez,* 514 U.S. at 558-59, 115 S.Ct. 1624.[1]

In *Lopez,* reiterated in *Morrison,* the Court outlined four considerations in determining whether purely intrastate activity substantially affects interstate commerce: (1) the commercial or economic nature of the intrastate activity; (2) the presence of a jurisdictional element in the statute; (3) the existence of congressional findings or legislative history demonstrating a link between the

[1] The panel found, and the parties do not dispute, that the first two *Lopez* categories, involving the channels or instrumentalities of interstate commerce, do not justify regulation of the Cave Species. *GDF Realty,* 326 F.3d at 629.

regulated activity and interstate commerce; and (4) how attenuated is the link between the intrastate activity and its effect on interstate commerce. *See Morrison,* 529 U.S. at 609-12, 120 S.Ct. 1740 (2000).[2]

In certain instances, an intrastate activity alone may substantially affect interstate commerce. *See Jones and Laughlin Steel,* 301 U.S. at 22, 57 S.Ct. 615 (NLRB order concerning unfair labor practices at a steel mill directly affected interstate commerce). In other instances, "the regulation can reach intrastate commercial activity that by itself is too trivial to have a substantial effect on interstate commerce but which when aggregated with similar and related activity, can substantially affect interstate commerce." *United States v. Ho,* 311 F.3d 589, 599 (5th Cir.2002); *see also Wickard v. Filburn,* 317 U.S. 111, 127-28, 63 S.Ct. 82, 87 L.Ed. 122 (1942).

As an initial matter, the panel correctly determined, unlike other courts, that the "regulated activity" under the ESA is Cave Species *takes*, not the appellants' planned commercial development of the land. *GDF Realty,* 326 F.3d at 633-34 (recognizing that "looking beyond the regulated activity . . . would 'effectually obliterate' the limiting purpose of the Commerce Clause") (citing *Jones and Laughlin Steel,* 301 U.S. at 37, 57 S.Ct. 615); *Ho,* 311 F.3d at 602 (recognizing that the regulated activity at issue was asbestos removal, rather than the plaintiff's commercial

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[2] Pertinent parts of the Endangered Species Act contain no statutory jurisdictional link between federal regulation and interstate commerce. Likewise, legislative history and congressional findings fail to tie species protection to commerce. These parts of the analysis concerning federal regulation of intrastate activity do not favor FWS.

enterprise); *but see Rancho Viejo, LLC v. Norton,* 323 F.3d 1062 (D.C.Cir.2003) (finding that the regulated activity was not the ESA take but rather the "construction of a commercial housing development").

Next the panel examined whether Cave Species takes, alone, have a "direct relationship" with and substantial effect on interstate commerce. *GDF Realty,* 326 F.3d at 637. FWS offered two theories for such a "direct relationship:" (1) the "substantial" scientific interest the Cave Species generate; and (2) possible future commercial benefits. The panel properly rejected each argument as speculative or too attenuated to commerce.

The panel finally turned to FWS's argument that Cave Species takes, although intrastate and non-economic in themselves, may be aggregated with all other endangered species, permitting the entirety of the regulatory scheme to pass constitutional muster.[3] "At issue is what circumstances must be present in order to justify aggregation when, as in this case, intrastate activity has a *de minimis* effect on interstate commerce." *GDF Realty,* 326 F.3d at 638. The panel concluded that this case warranted aggregation under *Lopez* and *Morrison,* because FWS's actions are essential to preserving an "economic" regulatory program. *Id.* at 639. I respectfully disagree. The panel's approval of aggregation in this case would not only sustain every conceivable application of the ESA, but entirely undercuts *Lopez* and *Morrison.*

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[3] The appellants concede that, if aggregated with all endangered species, the Cave Species takes would have a substantial effect on interstate commerce.

To explain the problem, a brief historical review of the aggregation principle is required. This court recognized in *Ho* that the aggregation principle "reached its zenith in *Wickard,* 'perhaps the most far-reaching example of commerce clause authority over intrastate activity.'" *Ho,* 311 F.3d at 599 (quoting *Lopez,* 514 U.S. at 560, 115 S.Ct. 1624). In *Wickard,* the Supreme Court upheld regulation of an intrastate farmer's personal consumption of home-grown wheat under the Agricultural Adjustment Act of 1938 because, " . . . his contribution [to the wheat market], taken together with that of many others similarly situated, is far from trivial." *Wickard,* 317 U.S. at 127-28, 63 S.Ct. 82. A primary purpose of the act in question was, as the Court noted, "to increase the market price of wheat and to that end to limit the volume thereof that could affect the market." *Id.* at 90-91.

After *Wickard,* the Court has sustained commerce clause legislation using aggregation in instances where Congress was regulating commercial activity. *See Katzenbach v. McClung,* 379 U.S. 294, 85 S.Ct. 377, 13 L.Ed.2d 290 (1964) (prohibiting refusal of restaurant service to interstate travelers); *Heart of Atlanta Motel v. United States,* 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964) (prohibiting refusal of hotel accommodations to interstate travelers); *Maryland v. Wirtz,* 392 U.S. 183, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968) (regulating wages of employees of business engaged in interstate commerce); *Perez v. United States,* 402 U.S. 146, 91 S.Ct. 1357, 28 L.Ed.2d 686 (1971) (regulating loan sharking); *Hodel v. Virginia Surface Mining and Reclamation Association,* 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981) (regulating coal industry); *see Lopez,* 514 U.S. at 560, 115 S.Ct. 1624 (recognizing

these "examples are by no means exhaustive, but the pattern is clear").

In both *Lopez* and *Morrison*, by contrast, the federal government's efforts to sustain non-economic criminal laws under the commerce clause through aggregation were rebuffed. In *Lopez*, only Justice Breyer's dissent accepted the theory that discrete instances of gun possession in a school zone, when aggregated, increased the costs of crime and reduced national productivity so as to justify the Gun-Free School Zones Act of 1990. *See Lopez*, 514 U.S. at 618-624, 115 S.Ct. 1624 (Breyer, J. dissenting). The Court majority rejected aggregation, because it would allow Congress to regulate "all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce." *Id.* at 564, 115 S.Ct. 1624. The Court concluded that, "if we were to accept the government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate." *Id.*

Likewise, in *Morrison*, the Court rejected arguments concerning the aggregate effects of sex-based crime on national productivity, increased medical and other costs, and a decreased supply and demand for interstate goods. *Morrison*, 529 U.S. at 615, 120 S.Ct. 1740. Again, the Court concluded that aggregation "would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit or consumption." *Id.* (adding that "the concern we expressed in *Lopez* that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority seems well-founded") (citing *Lopez*, 514 U.S. at 564, 115 S.Ct. 1624).

Together, these cases strongly suggest that when the Supreme Court has sustained Commerce Clause regulation under the aggregation principle, "the regulated activity was of an apparent commercial character." *Morrison,* 529 U.S. at 611, 120 S.Ct. 1740. Nevertheless, *Morrison* declined to create a categorical rule "against aggregating the effects of non-economic activity," even as it observed, "thus far in our nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where the activity is economic in nature." *Id.* at 613, 120 S.Ct. 1740.

The panel recognized that "[i]n light of *Lopez* and *Morrison,* the key question for purposes of aggregation is whether the nature of the regulated activity is economic." *GDF Realty,* 326 F.3d at 630. The panel conceded that "in a sense, Cave Species takes are neither economic nor commercial. There is no market for them; any future market is conjecture." *GDF Realty,* 326 F.3d at 638. The panel added that "[i]f the speculative future medical benefits from Cave Species makes their regulation commercial, then almost anything would be." *Id.* Furthermore, "there is no historic trade in the Cave Species, nor do tourists come to Texas to view them." *Id.* Finally, the panel rejected the government's argument that Cave Species takes become commercial in character once aggregated with other endangered species. *Id.* "To accept such a justification would render meaningless any 'economic nature' prerequisite to aggregation." *Id.*

Nevertheless, the panel aggregated the Cave Species takes with all takes of all endangered species because: (1) they are part of a larger regulation that is "directed at activity that is economic in nature" and (2) the intrastate activity (Cave Species takes) is an "essential part of the

economic regulatory scheme." *Id.* at 639 (internal citations and quotations omitted).

How the panel's conclusion follows from its generally excellent preceding discussion of *Lopez* and *Morrison,* I cannot fathom. The panel offers little reasoning why any take of a Cave Species is (a) part of a larger "economic" regulatory scheme; (b) so essential to the larger national scheme that the accidental crushing of one Cave Species underfoot (or even the diminutive species' destruction) threatens to undo the national program; and (c) so significant to the commerce clause that Congress, for the first time in U.S. history, is authorized to aggregate purely intrastate, non-economic activity.

It is undeniable that many ESA-prohibited takings of endangered species may be regulated, and even aggregated, under *Lopez* and *Morrison* because they involve commercial or commercially-related activities like hunting, tourism and scientific research. On this basis, the Fourth Circuit decision in *Gibbs v. Babbitt,* 214 F.3d 483, 493-96 (4th Cir.2000), approved federal red wolf regulations. Under reasoning like that in *Gibbs,* aggregation may be sustained on a species-by-species basis or across certain categories of species. The pursuit of hunting trophies, for instance, affects markets for hunting, outfitting, taxidermy, etc. Where the link between endangered species takes and commercial or economic activity is plain, courts need not be concerned about the limits of the aggregation principle.

But in this case, there is no link – as the panel concedes – between Cave Species takes and *any* sort of commerce, whether tourism, scientific research, or agricultural markets. Compare *Gibbs,* 214 F.3d at 493-95. The cautions

expressed in *Morrison* about aggregation of wholly intrastate non-economic activity should be taken seriously by the courts. *See GDF Realty,* 326 F.3d at 628. Elsewhere in its opinion, the panel was quite emphatic about this, saying "the *possibility* of future substantial effects of the Cave Species on interstate commerce . . . is simply too hypothetical and attenuated from the regulation to pass constitutional muster." *Id.* (citing *Morrison,* 529 U.S. at 612, 120 S.Ct. 1740) (emphasis in original).

When the panel nevertheless approves the application of the ESA to these Cave Species, its opinion becomes confusing and self-contradictory. First, the panel attempts to convert the ESA to an economic regulatory statute by opining that the majority of species takes would result from economic activity, and "the Cave Species takes would occur as a result of plaintiffs' planned commercial development." *GDF Realty,* 326 F.3d at 639. The panel had, however, rejected this argument earlier, when it found that the regulated activity is the take, not the planned commercial land development. *GDF Realty,* 326 F.3d at 633-34. As the panel itself understood, this "analysis would allow application of otherwise unconstitutional statutes to commercial actors, but not non-commercial actors. There would be no limit to Congress' authority to regulate intrastate activities, so long as those subjected to the regulation were entities which had an otherwise substantial connection to interstate commerce." *Id.* at 634.[4]

[4] Arguably, Congress could pass a statute prohibiting anyone engaged in interstate commerce from "taking" endangered species. But Congress did not do so in these parts of the statute.

Second, the panel states that Cave Species takes are essential to the ESA, because any take of any species "threaten[s] the interdependent web of all species." *GDF Realty,* 326 F.3d at 640 (internal quotations omitted). Under the panel's approach, "the essential purpose of the ESA is to protect the ecosystems upon which we and other species depend." *Id.* (quoting H.R.Rep. No. 93-412, at 10). Further, every take is "essential" to the ESA because the extinction of any species risks the extinction of all species, and the extinction of all species could lead to the extinction of ecosystems. *GDF Realty,* 326 F.3d at 640. At one level, this is no more than the "but-for-causal chain" approach twice rejected by the Supreme Court in *Lopez* and *Morrison.* Hence, "the *Lopez* Court declined to apply the aggregation principle in conjunction with long chains of causal inference that would have been necessary to arrive at a substantial effect on interstate commerce." *United States v. Wang,* 222 F.3d 234, 239 (6th Cir.2000). An even more obvious dissonance between the panel opinion and *Lopez, Morrison* and the Constitution is that the Commerce Clause regulates commerce, not ecosystems.[5]

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[5] That a true, not merely conjectural, economic activity must be the subject of Congress's regulation is reinforced by our court's debates over the Hobbs Act. In *United States v. Robinson,* 119 F.3d 1205 (5th Cir.1997), the panel reasoned that any robbery of a business that has an effect on interstate commerce under the Hobbs Act's express jurisdictional requirements may be aggregated with other similar crimes for purposes of establishing a "substantial effect." Here, there is no jurisdictional element, and the only aggregate effect articulated by the panel is on biodiversity, which the panel somehow equates with "economic" or commercial activity. It seems clear, though, that biodiversity is a condition of nature, not a human activity. The panel's opinion

(Continued on following page)

Third, while the panel acknowledges the Supreme Court's concern that federal legislation under the Commerce Clause must have a limiting principle so as not to obliterate the distinction between that which is truly national and that which is local, the panel's conclusion tramples that precept. The panel concludes, summarily, that its "interdependent web" approach "will not allow Congress to regulate land use or wildlife preservation." *GDF Realty,* 326 F.3d at 640. I disagree. Once the FWS designates a species as endangered, the Government has functional control over the land designated as its habitat. If such authority is not justified by a federal interest in regulating interstate commerce, it "would result in a significant impingement of the States' traditional and primary power over land and water use." *Solid Waste Agency,* 531 U.S. at 173-74, 121 S.Ct. 675.[6]

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goes farther than *Robinson* in permitting aggregation to overcome a commerce clause challenge.

[6] Contrary to recent Supreme Court authority, the panel interprets the Endangered Species Act extremely broadly to permit the federal government to regulate a matter of unique local concern. *See Solid Waste Agency,* 531 U.S. at 172-173, 121 S.Ct. 675 (Congressional authority must be narrowly construed "where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power."). Further, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, [courts] will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress" *Id.* (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council,* 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988)). *Id.* Regulation of land use is traditionally the province of state and local governments. *Hess v. Port Auth. Trans-Hudson Corp.,* 513 U.S. 30, 44, 115 S.Ct. 394, 130 L.Ed.2d 245 (1994).

Perversely, federal protection of the Cave Species has become a device to thwart not only these appellants' prospects of land development but also the State's construction of a highway, the quintessential modern artery of commerce. *See* "Dateline Texas: Officials at Odds over Spider Habitat," *Houston Chron.,* Feb. 22, 2004, at 35A (to get federal approval for highway construction over two limestone caverns housing the Cave Species, "state highway administrators must find a site in Williamson County that is also home to the endangered species and permanently preserve that site").

The panel also concludes, without explanation, that "the link" between Cave Species takes "and a substantial commercial effect is not attenuated." *GDF Realty,* 326 F.3d at 640. The panel's reasoning – all takes are essential, therefore, all takes have a substantial commercial effect – is circular. Even aside from this problem, the Fifth Circuit and other courts have recognized that in an otherwise constitutional federal regulatory scheme, some applications may go too far. *See e.g., United States v. Collins,* 40 F.3d 95, 99 (5th Cir.1994) (robbery of an individual citizen not covered under the Hobbs Act); *United States v. Wang, supra* (same); *United States v. Quigley,* 53 F.3d 909, 910-11 (8th Cir.1995). In fact, the panel's reasoning contradicts *Collins,* inasmuch as it would authorize federal criminal prosecution under the ESA of a landowner, or even an FWS agent, who climbed down into one of the caves in order to study the Cave Species and crushed one. *See* 16 U.S.C. §§ 1538-1540; compare *Rancho Viejo, supra,* 323 F.3d at 1080 (Ginsburg, J., concurring) (" . . . our rationale for concluding the take of the arroyo toad affects interstate commerce does indeed have a logical stopping point . . . Just as important, however, the lone hiker in the woods, or

the homeowner who moves dirt in order to landscape his property, though he takes the toad, does not affect interstate commerce.").

In the end, the panel is unable to refute the attenuation concern of *Lopez* and *Morrison* because its analysis rests on the false implication that all takes of all species necessarily relate to an ecosystem, which by its very grandiosity must at some point be "economic" in actuality or in effect. This is precisely the reasoning rejected by the Supreme Court. Not all crime is "economic" for commerce clause purposes, in actuality or effect, even though any or all of its human victims may become impoverished. Not all crimes against women are "economic" in practicality or effect, despite the same possible consequences. The Commerce Clause does not regulate crime, sexual inequity, or ecosystems as such – it regulates commerce. Thus, I reiterate: many applications of the ESA may be constitutional, but this one simply goes too far. To be faithful to the Supreme Court's principles in *Lopez* and *Morrison* and this court's Commerce Clause decisions, we should rehear this case *en banc*.

PERTINENT STATUTORY PROVISIONS

Section 9(A)(1) of the Endangered Species Act, 16 U.S.C. §1538(A)(1), states: "[W]ith respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to . . . (B) take any such species within the United States or the territorial sea of the United States; . . . "

Section 3(19) of the Endangered Species Act, 16 U.S.C. §1532(19), states: "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."

Section 11(a)(1) of the Endangered Species Act, 16 U.S.C. §1540(a)(1), states: "Any person who knowingly violates, . . . any provision of this chapter, . . . or of any regulation issued in order to implement subsection (a)(1) . . . (B), . . . may be assessed a civil penalty by the Secretary of not more than $25,000 for each violation. . . . Each violation shall be a separate offense. . . . "

Section 11(b)(1) of the Endangered Species Act, 16 U.S.C. §1540(b)(1), states: "Any person who knowingly violates any provision of this chapter, . . . , or of any regulation issued in order to implement subsection (a)(1) . . . (B), . . . of section 1528 of this title, shall, upon conviction, be fined not more than $50,000 or imprisoned for not more than one year, or both."

"Harm" in the definition of "take" in the Endangered Species Act has been administratively defined by the United States Fish & Wildlife Service to mean "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills

or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."

50 C.F.R. §17.3.

(3)

No. 03-1619

SEP 1 - 2004

In the Supreme Court of the United States

GDF REALTY INVESTMENTS, LTD., PARKE PROPERTIES I, L.P., AND PARKE PROPERTIES II, L.P., PETITIONERS

v.

GALE A. NORTON, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether restrictions on commercial development activities that would result in the taking of endangered cave invertebrates, imposed pursuant to Section 9(a)(1)(B) of the Endangered Species Act of 1973, 16 U.S.C. 1538(a)(1)(B), are a permissible exercise of Congress's authority under the Commerce Clause.

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v.

GALE A. NORTON, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-43) is reported at 326 F.3d 622. The per curiam order of the court of appeals denying the petition for rehearing (Pet. App. 75-89) is reported at 362 F.3d 286. The opinion of the district court (Pet. App. 44-74) is reported at 169 F. Supp. 2d 648.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 2003. A petition for rehearing was denied on February 27, 2004 (Pet. App. 75-89). The petition for a

writ of certiorari was filed on May 24, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners challenge the application of Section 9 of the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1538, which prohibits the "taking" of any endangered species without a permit, to their proposed development activities in Travis County, Texas. The district court granted the government's motion for summary judgment and dismissed the case. Pet. App. 44-74. The court of appeals affirmed. *Id.* at 1-43.

1. Congress has long enacted laws to protect species of particular federal concern. Initially, individual species were protected through separate statutes, rather than under the umbrella of any single conservation law. See, *e.g.*, Black Bass Act, ch. 346, 44 Stat. 576 (1926) (repealed by Act of Nov. 16, 1981, Pub. L. No. 97-79, § 9(b)(2), 95 Stat. 1079 (1981)); Bald Eagle Protection Act, ch. 278, 54 Stat. 250 (1940) (16 U.S.C. 668 *et seq.*); Frederico M. Cheever, *An Introduction to the Prohibition Against Takings in Section 9 of the Endangered Species Act of 1973: Learning to Live with a Powerful Species Preservation Law*, 62 U. Colo. L. Rev. 109, 122-125 (1991). Congress's initial attempts to protect endangered species as a class focused on the acquisition and maintenance of federal land to serve as habitat for the species, see Act of Oct. 15, 1966, Pub. L. No. 89-669, 80 Stat. 926, and on restrictions on the importation into the United States of endangered fish and wildlife, see Endangered Species Conservation Act of 1969, Pub. L. No. 91-135, 83 Stat. 275.

The ESA, enacted in 1973, represents a comprehensive congressional effort to protect and conserve endangered and threatened species. 16 U.S.C. 1531(b).

To accomplish that goal, Congress directed the Secretaries of the Interior and of Commerce to list threatened and endangered species, designate their critical habitats, and otherwise administer the Act. See 16 U.S.C. 1533. The Fish and Wildlife Service (FWS) implements the Act with respect to listed species within the jurisdiction of the Secretary of the Interior, see 50 C.F.R. 17.11, 402.01(b), including the species at issue in this case, while the National Marine Fisheries Service administers the ESA with respect to marine species within the jurisdiction of the Secretary of Commerce, see 50 C.F.R. 223.102, 224.101.

Section 9(a)(1)(B) of the Act, 16 U.S.C. 1538(a)(1)(B), makes it unlawful for any person to "take" an endangered species within the United States except with a permit or other authorization. That ban has been extended by regulation to threatened species. See 50 C.F.R. 17.21(c)(1), 17.31(a). The ESA defines the term "take" to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. 1532(19). For purposes of the ESA's "take" prohibition, regulations promulgated by FWS define the term "harm" to mean "an act which actually kills or injures wildlife," including significant habitat "modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns." 50 C.F.R. 17.3; see *Babbitt* v. *Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687 (1995) (upholding regulatory definition). Pursuant to Section 10 of the ESA, the Secretary of the Interior or of Commerce may issue a permit for the "incidental take" of listed species under certain circumstances. 16 U.S.C. 1539(a)(2)(B)(i)-(v). Any taking of a listed species consistent with such an

"incidental take" permit does not violate Section 9. 16 U.S.C. 1539(a)(1)(B).

2. In 1983, petitioners acquired undeveloped land in Travis County, Texas. Pet. App. 45. Petitioners' land provides habitat for six species of cave invertebrates (collectively the Cave Species)—the Tooth Cave pseudoscorpion, the Tooth Cave spider, the Tooth Cave ground beetle, the Kretschmarr Cave mold beetle, the Bee Creek Cave harvestman, and the Bone Cave harvestman—that have been listed as endangered by FWS. *Id.* at 2-3, 45 & n.1. Outside of museum and research collections, those species can be found only within underground caves in Travis and Williamson Counties in central Texas. *Id.* at 45; 53 Fed. Reg. 36,030 (1988).

The Cave Species are a subject of substantial scholarly interest. As the district court observed, "scientists across the country have studied the Cave Species and transported them to/from the American Museum of Natural History in New York, the California Academy of Sciences, the Academy of Natural Sciences in Philadelphia, the Field Museum of Natural History in Chicago, and the Texas Memorial Museum." Pet. App. 65 n.16; see 53 Fed. Reg. at 36,030, 36,032 (FWS explains that five of the species have been studied and collected by scientists since the 1960s and 1970s, and that articles regarding the species have been published in national scientific publications and at least one international journal). In listing five of the species as endangered, FWS noted that "[t]he primary threat to the five species comes from potential loss of habitat owing to ongoing development activities," and that the species' caves "are in an area for which a major residential, commercial, and industrial development has been proposed." *Id.* at 36,031.

3. After purchasing the Travis County property, petitioners sought to develop it. Pet. App. 2, 45. In March 1989, FWS informed petitioners that their intended development activities might effect a take of the endangered Cave Species. *Id.* at 47-48. Discussions between the FWS and petitioner concerning the likely effect of their proposed development on the listed species, and the possibility that an incidental take permit could be issued, continued for several years. See *id.* at 4-6, 48-50. Petitioners ultimately filed the instant suit in federal district court, alleging that the application of ESA Section 9 to their development activities exceeded Congress's authority under the Commerce Clause. See *id.* at 6, 50. The district court granted the government's motion for summary judgment. *Id.* at 44-74.

The district court explained that

> the regulated activity in this case is [petitioners'] alleged take of the Cave Species by their planned development of the Property. This development includes plans to build a shopping center, a residential subdivision, and office buildings on the Property. It also includes [petitioners'] proposal to build a Wal-Mart and an apartment complex on the Property.

Pet. App. 61 (citation and internal quotation marks omitted). The court held that FWS's "application of the take provision in this case is a constitutional exercise of the Commerce Clause power, because the activity being regulated, both standing alone or under the aggregation principle, would easily be classified as substantially affecting interstate commerce." *Id.* at 65. The court found it "obvious that the effect of building Wal-Marts and apartment complexes, in the aggregate, quite substantially affects interstate commerce." *Id.* at 64.

4. The court of appeals affirmed. Pet. App. 1-43.

a. The court of appeals stated that, in its view, petitioners' challenge to the application of ESA Section 9 in this case could not be rejected solely on the ground that petitioners' own proposed development activities are commercial in nature. Pet. App. 20-27. Rather, the court held that, in determining whether Section 9 is a permissible exercise of congressional power under the Commerce Clause, it is appropriate to consider the aggregate economic effects of takes of *all* listed species, not simply of the Cave Species. *Id.* at 30-36. In support of its conclusion that aggregation at that level was appropriate, the court explained that the "ESA's protection of endangered species is economic in nature," *id.* at 32, both because the "ESA's drafters were concerned by the 'incalculable' value of the genetic heritage that might be lost absent regulation," *ibid.*, and because "it is obvious that the majority of takes would result from economic activity," *id.* at 33. Because petitioners had conceded that takes of all listed species, considered in the aggregate, substantially affect interstate commerce, the court rejected petitioners' constitutional challenge. See *id.* at 31-36.

b. Judge Dennis filed a concurring opinion. Pet. App. 37-43. Judge Dennis concluded that "[t]he interrelationship of commercial and non-commercial species is so complicated, intertwined, and not yet fully understood that Congress acted rationally in seeking to protect all endangered or threatened species from extinction or harm." *Id.* at 42. He also noted that, "as the Congress recognized, some of the presently covered non-commercial species will prove to be of 'incalculable' future value to the nation and its economy because they are sources of genetic, scientific, and biomedical research and development that will likely facilitate the

production of commercial goods, services, and techniques." *Id.* at 43. He concluded that application of ESA Section 9 to prohibit takes of the Cave Species is constitutional "because such regulation is essential to the efficacy of—that is, the regulation is necessary and proper to—the ESA's comprehensive scheme." *Ibid.*

c. The court of appeals denied petitioners' petition for rehearing and rehearing en banc, with six judges dissenting. Pet. App. 75-89.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. The courts of appeals that have considered the question have uniformly sustained the constitutionality of ESA Section 9's prohibition on takings of listed species. See *Rancho Viejo, LLC* v. *Norton*, 323 F.3d 1062 (D.C. Cir. 2003), cert. denied, 124 S. Ct. 1506 (2004); *Gibbs* v. *Babbitt*, 214 F.3d 483 (4th Cir. 2000), cert. denied, 531 U.S. 1145 (2001); *National Ass'n of Home Builders (NAHB)* v. *Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), cert. denied, 524 U.S. 937 (1998).[1] Indeed, to our knowledge no court—either before or after this Court's decision in *Lopez*—has invalidated any federal wildlife legislation as exceeding the reach of Congress's power under the Commerce Clause. Affirmation of federal authority to act in this sphere is particularly appropriate because systemic obstacles exist to the

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[1] See also, *e.g.*, *United States* v. *Bramble*, 103 F.3d 1475 (9th Cir. 1996) (upholding the constitutionality of the Bald Eagle Protection Act); *Palila* v. *Hawaii Dep't of Land & Natural Res.*, 471 F. Supp. 985 (D. Haw. 1979) (upholding the application of ESA Section 9 to Hawaiian bird species), aff'd, 639 F.2d 495 (9th Cir. 1981).

adoption and enforcement of effective state wildlife-protection measures. See *Rancho Viejo*, 323 F.3d at 1079; *Gibbs*, 214 F.3d at 501 (Congress may act to "arrest the 'race to the bottom' in order to prevent interstate competition whose overall effect would damage the quality of the national environment"). This Court has recognized the validity of that basis for an Act of Congress under the Commerce Clause. See *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 281-282 (1981); *United States* v. *Darby*, 312 U.S. 100, 115 (1941); see also *Alaska Dep't of Envtl. Conservation* v. *EPA*, 124 S. Ct. 983, 1000 (2004).

In recent years, moreover, this Court has repeatedly denied petitions for certiorari that have presented Commerce Clause challenges to Section 9 of the ESA. See *Rancho Viejo*, *supra* (No. 03-761); *Building Indus. Ass'n* v. *Norton*, 534 U.S. 1108 (2002) (No. 01-620); *Gibbs*, *supra* (No. 00-844); *NAHB*, *supra* (No. 97-1451). There is no reason for a different result here.[2]

2. Petitioners contend (Pet. 13-22) that the court of appeals erred in considering the aggregate effects on interstate commerce of takings of *all* listed species. Petitioners argue that, under this Court's decisions in *United States* v. *Lopez*, 514 U.S. 549 (1995), and *United States* v. *Morrison*, 529 U.S. 598 (2000), aggregation analysis is appropriate only when the regulated conduct

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[2] In *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), decided shortly after *Lopez*, this Court held that the Secretary of the Interior had reasonably construed the term "harm," as used in the ESA's definition of "take," to include habitat modification that would kill or injure members of a listed species. No member of the Court suggested that the ESA, so construed, might exceed Congress's power under the Commerce Clause.

is economic in character; and they assert that Section 9 of the ESA regulates non-economic activities. Those arguments lack merit.

This Court in *Morrison* expressly declined to "adopt a categorical rule against aggregating the effect of any noneconomic activity." 529 U.S. at 613. In any event, the conduct regulated by Section 9 of the ESA is principally of an economic nature. The ESA contains a congressional finding that "various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation." 16 U.S.C. 1531(a)(1). And, as an empirical matter, it appears to be undisputed that "the majority of takes would result from economic activity." Pet. App. 33; see *Rancho Viejo*, 323 F.3d at 1078 (endorsing the government's representation that "the activities that cause the loss of endangered species and that are regulated by the take prohibition are themselves generally commercial and economic activities"); see also 53 Fed. Reg. at 36,031 (FWS explains that "[t]he primary threat to the [Cave Species] comes from potential loss of habitat owing to ongoing development activities"). Indeed, petitioners identify *no* litigated case in which ESA Section 9 has *ever* been applied to conduct undertaken for wholly noneconomic purposes. The instant case is thus quite different from *Lopez* and *Morrison*, in which there was no reason to suppose that violations of the challenged statutes would typically be committed for economic reasons or by commercial actors.

Petitioners' demand for proof of the commercial importance of the Cave Species in isolation is also inconsistent with two central (and related) premises of the ESA: that individual species are part of an interdependent web, and that the significance of a particular

species cannot always be easily determined at a given point in time. Section 9 of the ESA regulates takings of all species that have met the strict criteria for listing by FWS or NMFS as endangered or threatened. "In the aggregate, * * * we can be certain that the extinction of species and the attendant decline in biodiversity will have a real and predictable effect on interstate commerce." *NAHB*, 130 F.3d at 1053-1054 (opinion of Wald, J.). A focus on the aggregate commercial significance of all listed species is particularly appropriate in light of (1) the difficulty of identifying *ex ante* the commercial potential of a particular species, and (2) the fact that extirpation of a species eliminates for all time the possibility of future commercial uses.[3]

In resolving questions concerning the proper construction of the ESA, this Court has recognized Congress's concern "about the *unknown* uses that endangered species might have and about the *unforeseeable* place such creatures may have in the chain of life on this planet." *TVA* v. *Hill*, 437 U.S. 153, 178-179 (1978). The Court in *TVA* v. *Hill* relied on the Act's legislative history, which emphasized the "*incalculable*" value of endangered species as "potential resources" and "keys to puzzles which we cannot solve." *Id.* at 178 (quoting H.R. Rep. No. 412, 93d Cong., 1st Sess. 4-5 (1973)). Pre-

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[3] While the court of appeals properly considered the aggregate economic effects of takings of *all* listed species, extirpation of the Cave Species standing alone could be expected to have a meaningful impact on interstate commerce. Although "[t]here is no commercial market for the Cave Species," the species have been the subject of widespread scholarly interest, some of it by scholars who "have visited Texas in order to study the Cave Species." Pet. App. 4. In addition, "members of the Cave Species have been transported to and from museums in New York, California, Pennsylvania, Illinois, and Kentucky." *Ibid.*

cisely because extinction of an endangered species may have irremediable consequences that cannot readily be foreseen, the few remaining members of the species are appropriately regarded as a valuable national resource subject to protection by Congress. As the Fourth Circuit has observed, "[i]t would be perverse indeed if a species nearing extinction were found to be beyond Congress's power to protect while abundant species were subject to full federal regulatory power." *Gibbs*, 214 F.3d at 498.[4]

3. In any event, Congress clearly possesses constitutional authority to regulate the sort of large-scale commercial development activities in which petitioners wish to engage. That power may appropriately be

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[4] Contrary to petitioner's suggestion (Pet. 18-19), the absence of an express jurisdictional element does not render ESA Section 9 unconstitutional. Although this Court in both *Lopez* (see 514 U.S. at 562) and *Morrison* (see 529 U.S. at 611-612) found the absence of an express jurisdictional element to be relevant to the constitutional analysis, neither decision suggests that such an element is a prerequisite to valid Commerce Clause legislation. As the D.C. Circuit pointed out in *Rancho Viejo*, "all of the circuits that have addressed the question since *Lopez* (as well as those that have considered the matter since *Morrison*) have concluded that the absence of an express jurisdictional element is not fatal to a statute's constitutionality under the Commerce Clause." 323 F.3d at 1068; see, *e.g.*, *Groome Res. Ltd., L.L.C.* v. *Parish of Jefferson*, 234 F.3d 192, 211 (5th Cir. 2000) (upholding provision of Fair Housing Amendments Act despite lack of express jurisdictional element); *United States* v. *Moghadam*, 175 F.3d 1269, 1276-1277 (11th Cir. 1999) (noting that a jurisdictional element "is helpful" but that its absence "does not necessarily mean the Commerce Clause cannot serve as authority"), cert. denied, 529 U.S. 1036 (2000); *United States* v. *Olin Corp.*, 107 F.3d 1506, 1510 (11th Cir. 1997) (Comprehensive Environmental Recovery, Compensation, and Liability Act valid as applied despite lack of jurisdictional element).

exercised to achieve both economic and noneconomic objectives. See, *e.g.*, *Rancho Viejo*, 323 F.3d at 1074 (explaining that this Court "has long held that Congress may act under the Commerce Clause to achieve noneconomic ends through the regulation of commercial activity"). As the D.C. Circuit correctly held in *Rancho Viejo*, Section 9 of the ESA is therefore constitutional as applied to petitioners' own conduct, whether or not it would be constitutional as applied to "a hiker's casual walk in the woods." *Id.* at 1077 (internal quotation marks omitted).[5]

"Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610 (1973). This

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[5] In rejecting petitioners' constitutional challenge to Section 9 of the ESA, the district court emphasized the commercial character of petitioners' proposed development activities. See Pet. App. 56-57, 61-65. In rejecting that mode of analysis, the court of appeals expressed the view that, under the district court's approach, "[t]here would be no limit to Congress' authority to regulate intrastate activities, so long as those subjected to the regulation were entities which had an otherwise substantial connection to interstate commerce." *Id.* at 23. That criticism is misconceived. The district court did not suggest that an entity's involvement in commercial activities is by itself a sufficient basis for federal regulation of *other* conduct by the same entity, if the regulated conduct lacks a constitutionally sufficient nexus to interstate commerce. Rather, the district court found Section 9 to be constitutional as applied because the specific conduct that is restricted by the take prohibition in this case is the proposed development of petitioners' land for commercial purposes. See, *e.g.*, *id.* at 61; p. 5, *supra*.

Court recently reaffirmed that facial overbreadth challenges—*i.e.*, contentions that, even though the litigant's own conduct may validly be subjected to regulation, the statute applied to him is unconstitutional on its face because it would be invalid as applied to others—are very rarely warranted. See *Sabri* v. *United States*, 124 S. Ct. 1941, 1948-1949 (2004). The Court in *Sabri* cautioned that "[f]acial challenges of this sort are especially to be discouraged," and it observed that this Court has "recognized the validity of facial attacks alleging overbreadth (though not necessarily using that term) in relatively few settings, and, generally, on the strength of specific reasons weighty enough to overcome [the Court's] well-founded reticence." *Id.* at 1948.

To bar application of ESA Section 9 to commercial development activities, based on a claim that the provision would be unconstitutional as applied to noneconomic conduct, "would mean recognizing the kind of overbreadth challenge [this] Court has expressly forsworn." *Rancho Viejo*, 323 F.3d at 1078.[6] Recognition of an overbreadth claim would be especially inappropriate in the present context, since takings of listed species in violation of ESA Section 9 *characteristically*

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[6] Petitioners' legal theory reflects an artful attempt to obtain the most advantageous features of both "as applied" and "facial" review. On the one hand, petitioners contend that the Court should focus solely on the economic consequences of takings of the Cave Species, and should ignore the economic effects of other applications of Section 9 (and of the remainder of the ESA). At the same time, petitioners ask the Court to disregard their own status as business entities, and the commercial character of the specific development activities that implicate the take prohibition in this case, on the ground that Section 9 applies to noneconomic as well as economic actors. See *Rancho Viejo*, 323 F.3d at 1077 (characterizing a similar line of argument as "simply the plaintiff's attempt to have its cake and eat it too"); Pet. App. 57-58.

result from economic activity. See p. 9, *supra*. Compare *United States* v. *Raines*, 362 U.S. 17, 23 (1960) (suggesting that facial invalidation may be appropriate where a statute is "unconstitutional in the vast majority of its intended applications, and it can fairly be said that it was not intended to stand as valid, on the basis of fortuitous circumstances, only in a fraction of the cases it was originally designed to cover"). In *Lopez* and *Morrison*, by contrast, there was no reason to suppose that violations of the challenged statutes would typically be committed for economic reasons or by commercial actors.[7]

4. Petitioners contend that the lower courts are in "complete disarray regarding the scope of the federal government's Commerce Clause authority to regulate takes of intrastate, non-economic species." Pet. 22; see Pet. 22-30. Petitioners do not and cannot contend, however, that *any* court has held Section 9 to be unconstitutional, either on its face or as applied to any set of facts. See p. 7, *supra*. Rather, the thrust of petitioners' claim of lower court "disarray" is that different courts have employed different rationales in sustaining Section 9 against Commerce Clause attack.

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[7] The petition in this case need not be held pending the Court's decision in *Ashcroft* v. *Raich*, cert. granted, No. 03-1454 (June 28, 2004). *Raich* presents the question whether the Controlled Substances Act, 21 U.S.C. 801 *et seq.*, may constitutionally be applied to the "intrastate cultivation and possession of marijuana for purported personal 'medicinal' use or to the distribution of marijuana without charge for such use." 03-1454 Pet. at (I). Unlike the plaintiffs in *Raich*, petitioners are business entities, and they do not dispute that their proposed development activities are commercial in nature. The Court's decision in *Raich* therefore is unlikely to affect the proper disposition of the instant case.

This Court "reviews judgments, not statements in opinions." See, *e.g.*, *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam); *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956); see also *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984); *Williams* v. *Norris*, 25 U.S. (12 Wheat.) 117, 120 (1827). The difference in reasoning that petitioners describe does not create a circuit conflict, nor does it leave regulated entities in any practical uncertainty as to the scope of their obligations under the ESA. Absent some disagreement among the circuits regarding the ultimate question whether ESA Section 9 is constitutional, this Court's review is not warranted.

In addition, petitioners overstate even the divergence between the approaches of the different courts of appeals. Although the Fifth Circuit in the instant case (unlike the D.C. Circuit in *Rancho Viejo*) declined to resolve the constitutional question solely on the ground that the regulated entity's own conduct was commercial in character (see Pet. App. 27), the Fifth Circuit found it "obvious that the majority of takes would result from economic activity" (*id.* at 33), and it attached some (though not dispositive) significance to the fact that the specific takes at issue in this case "would occur as a result of [petitioners'] planned commercial development" (*ibid.*). Moreover, the biodiversity rationale for sustaining ESA Section 9 against constitutional challenge, on which the Fifth Circuit principally relied, was endorsed by the D.C. Circuit in *NAHB*, see 130 F.3d at 1058-1059, and the court in *Rancho Viejo* specifically disclaimed any intent to repudiate that aspect of *NAHB*'s analysis, see 323 F.3d at 1066-1067 & n.2. The *Rancho Viejo* court's express *reservation* of the question whether that mode of analysis remains appropriate

(see *id.* at 1077 & n.20) cannot reasonably be thought to conflict with the Fifth Circuit's decision here.

In any event, it is altogether clear that the outcome of the instant case, which involves the application of ESA Section 9 to large-scale commercial development, would be the same under the D.C. Circuit's constitutional approach. See *Rancho Viejo*, 323 F.3d at 1077-1078. Even if the analytic variance between the courts of appeals potentially warranted resolution by this Court, the instant case would therefore be an inappropriate vehicle to resolve it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 03-1619

In the Supreme Court of the United States

GDF REALTY INVESTMENTS, LTD.; PARKE PROPERTIES I, L.P.; AND PARKE PROPERTIES II, L.P.,

Petitioners,

v.

GALE A. NORTON, Secretary of the Interior, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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The government defends the application of the ESA take provision to the cave insects with two conflicting rationales—both of which defy *Lopez* and *Morrison*. Though differing in approach, both suffer from the same basic flaw—they employ misdirected "substantial effects" inquiries that shift the focus from the expressly regulated activity to other attenuated connections with commerce. These inconsistent rationales highlight the disarray in the lower courts, and their lack of fidelity to *Lopez* and *Morrison* underscores the reason why this Court's intervention is urgently needed.

First, the government half-heartedly attempts to defend the Fifth Circuit's extraordinarily broad holding that although cave insect takes alone do not substantially affect interstate commerce, they can be regulated based on the aggregate effect on commerce of *all takes of all endangered species*. This rationale uses a factually unsupported and legally flawed "interdependent web" analysis to shift the focus from the non-economic activity regulated here (cave insect takes) to the economic effects of taking other species. This Court has *never* allowed aggregation of non-economic conduct, however, and there is no compelling reason to do so here.

The second rationale offered by the government is flatly at odds with the first and directly contradicts the Fifth Circuit's holding below. Whereas the first rationale focuses on the effect of takes (but mistakenly includes all species and aggregates non-economic conduct), the second rationale mistakenly shifts the focus from cave insect takes to the petitioners' commercial motivations—conduct which is not regulated by the express terms of the take provision.

In addition to relying on conflicting rationales, the government concedes key facts that undermine its position. It does not dispute that the cave insects have never been traded in commerce or that they have no known commercial value; that all cave insect takes are intrastate; or that the courts below found no evidence that cave insect takes have *any* effect on interstate commerce, much less a substantial effect.

The government concedes significant legal issues as well. It makes no attempt to defend the take provision under either the "channels" or "instrumentalities" categories of Commerce Clause authority. Moreover, the government's defense under the "substantial effects" category concedes that the take provision lacks a jurisdictional element and that Congress made no findings regarding any "substantial effect" of takes on interstate commerce. Finally, the government wholly ignores this Court's admonition that a Commerce Clause rationale must have a logical stopping point. Because neither rationale advanced by the government contains such a limit, the Court should grant the writ to resolve the conflict evident in the lower courts and to restore appropriate *commercial* limits to the commerce power.

1. This Court should review the Fifth Circuit's decision because it deepens inter-circuit disagreements over the scope of Commerce Clause authority to regulate takes of wholly intrastate, non-economic species. Although no court has struck down an application of the ESA "take" provision to such species (and some have foreclosed future as-applied challenges[1]), the Fifth Circuit below expressly rejected the *sole* rationale that the D.C. Circuit used to uphold a similar application of the ESA in *Rancho Viejo*.[2] In fact, *every* post-*Lopez* case in this area has been closely divided, with strong dissents by respected jurists such as Jones, Sentelle, Luttig, and Roberts.

The majority below held that the activity regulated by ESA § 9(a)(1)(B)—"takes" of cave insects—is not economic or connected to commerce and that petitioners' motive for that activity is irrelevant because it is not the focus of the

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[1] See Pet. App. 34-36, 88-89; *NAHB*, 130 F.3d at 1052-54 (D.C. Cir. 1997) (Wald, J.); *id.* at 1058-59 (Henderson, J., concurring).

[2] Compare Pet. App. 20-27 with *Rancho Viejo*, 323 F.3d at 1067; see also *id.* at 1159 (Sentelle, J., dissenting from denial of reh'g *en banc*); *id.* at 1160 (Roberts, J., dissenting from denial of reh'g *en banc*).

statute.[3] Pet. App. 21, 28-30. The government does not defend that holding. Instead, it endorses the D.C. Circuit's contrary focus on commercial motive. U.S. Br. 11-12. The government tries to obscure this disagreement by burying it in footnotes,[4] misstating the Fifth Circuit's reasoning,[5] and throwing in a red herring about facial versus as-applied challenges,[6] but these stratagems will not make the disagreement go away.

The Fourth, Fifth, and D.C. Circuits also cannot agree on how and to what extent takes of a non-economic endangered species can be aggregated with other takes in an attempt to locate a substantial effect on commerce. Pet. 28-29. As Judge Edith Jones pointed out in her dissent for six members of the *en banc* Fifth Circuit, the panel's expansive use of aggregation "rests on the false implication that all takes of all

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[3] The government persistently misidentifies this case as a general challenge to ESA § 9 (U.S. Br. 2, 9, 11, 12-15) so that it can rely on connections with commerce not relevant here ("the conduct regulated by Section 9 of the ESA is principally of an economic nature," U.S. Br. 9). This case only challenges § 9(a)(1)(B) as applied to intrastate, non-economic species of cave insects. Unlike § 9(a)(1)(B), other provisions of § 9 have jurisdictional elements tying the regulated activity to commerce. Pet. 19 n.7.

[4] Compare U.S. Br. 10 n.3, 12 n.5 with Pet. App. 20-25, 28-29 (rejecting government arguments that scientific interest in cave species or commercial motivation of petitioners' actions supply a substantial connection to commerce).

[5] Compare U.S. Br. 15 (Fifth Circuit "declined to resolve the constitutional question solely on the ground that the regulated entity's own conduct was commercial in character") with Pet. App. 21, 28-30 (squarely rejecting government's argument that takes of cave species alone substantially affect interstate commerce).

[6] Petitioners assert an as-applied challenge to ESA § 9(a)(1)(B), not a facial or overbreadth challenge. Compare Pet. 1 and Pet. App. 1, 20, 90 with U.S. Br. 12-14 & n.6. The government's argument that petitioners are trying to have it both ways is baseless. The reason petitioners ask this Court to disregard any commercial motivation for cave species takes is that, as the Fifth Circuit held, such motives are irrelevant.

species necessarily relate to an ecosystem, which by its very grandiosity must at some point be 'economic' in actuality or effect." Pet. App. 89. In addition, as Judge Sentelle has observed, the ESA establishes "no general regulatory scheme of interstate commerce in a commodity such that the cumulative effect of purely local state and private activities could substantially affect it." *NAHB*, 130 F.3d at 1066-67 (Sentelle, J., dissenting). And aggregation cannot in any event be used to sustain regulation of entirely non-economic activity, as Judge Luttig has explained. *Gibbs*, 214 F.3d at 507-08 (Luttig, J., dissenting).

This disarray as to two key questions (the ESA-regulated activity to which Commerce Clause analysis applies and the scope and operation of the aggregation principle), combined with the vigorous dissents from distinguished jurists that characterize the decisions in this area, powerfully signal that these circuits erred in their analyses and that this Court's review is now necessary. The lack of a split in *outcomes* is not significant. The question presented affects the balance of power between the States and the federal government, which this Court traditionally has taken pains to preserve. And further percolation would be of no benefit. The range of competing viewpoints has been thoroughly explored in the opinions, dissents, and concurrences in the courts below, not to mention legal commentary and the briefing that has been (and would be) provided to the Court by the parties and numerous *amici*. And the stark facts of this case provide an excellent vehicle for considering the limits of congressional power to regulate takes of wholly intrastate, non-economic species under the Commerce Clause.

This Court should also review the Fifth Circuit's decision because it is at odds with *Lopez* and *Morrison*. The government barely responds to our extensive explanation (Pet. 13-22) that the requirements of *Lopez* and *Morrison* are not satisfied here, and it refuses to acknowledge that this Court has *never* approved aggregation of non-economic

conduct. Instead of treating the non-economic nature of cave species takes, the lack of a jurisdictional element in the statute (Pet. 18-19), and the lack of findings regarding a substantial effect on commerce (Pet. 19-20) as reasons to interpret the ESA narrowly, the government dismisses those factors as unimportant, relying on *NAHB* and the decision below to support an extraordinarily expansive view of aggregation. U.S. Br. 9-11 & n.4. The government also fails to explain how its aggregation argument has a logical stopping point, as *Lopez* and *Morrison* require. This Court should grant the writ to ensure that the requirements of *Lopez* and *Morrison* are not "consigned to aberration" (*Gibbs*, 214 F.3d at 508 (Luttig, J., dissenting))—as the government seems to believe they should be—but are applied as the "proper framework for conducting the required analysis" of whether Congress has exceeded the bounds of its Commerce Clause authority. *Morrison*, 529 U.S. at 609.

2. Absent aggregation, which is improper for reasons discussed in section 3 below, applying the ESA take provision to wholly intrastate, non-economic species such as the cave insects violates the Commerce Clause. The government offers two arguments against this conclusion, neither of which is persuasive. First, it pretends that cave insect takes "can be expected to have a meaningful impact" on commerce because, in the past, a few scientists traveled to Texas to study the insects or take specimens for museums. U.S. Br. 4, 10 n.3. As the Fifth Circuit explained, however, this connection to commerce is "negligible," "theoretical," and "far too attenuated to pass muster" when the substantial effect requirement of *Lopez* and *Morrison* is taken seriously. Pet. App. 28-29. The government's position is a clear example of what this Court cautioned against in *Maryland* v. *Wirtz*: the use of "a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." 392 U.S. 183, 196 n.27 (1968); see also Pet. 21.

Second, the government attempts to shift the focus away from activities expressly regulated by the plain text of the ESA—here, cave insect takes—to "the sort of large-scale commercial development activities in which petitioners wish to engage," arguing that Congress clearly possesses authority to regulate such activities. U.S. Br. 11-12. But this argument—which the D.C. Circuit accepted in *Rancho Viejo*—is beside the point. The ESA does not purport to regulate either commercial development activity or activity undertaken with a commercial motive.[7] See Pet. App. 85 n.4 (Jones, J., dissenting from denial of reh'g *en banc*) ("Arguably, Congress could pass a statute prohibiting anyone engaged in interstate commerce from 'taking' endangered species. But Congress did not do so in these parts of the statute."). As the Fifth Circuit correctly explained, the proper inquiry is whether takes themselves (the activity objectively regulated by the statute) have a substantial effect on commerce, not whether the subjective *motive* for takes is commercial or whether *regulation* of takes would affect commercial actors. See Pet. App. 21-27; Pet. 3, 10, 23-28.

The Fifth Circuit also noted that the facial challenges in *Lopez* and *Morrison* would have failed under the government's (and *Rancho Viejo*'s) approach, because the statutes could constitutionally have been applied to gun possession or violence against women undertaken for a commercial purpose. Pet. App. 24. The government responds that in those cases there was no reason to suppose violations would typically be committed by commercial actors or for economic reasons. U.S. Br. 14. But in *Lopez* itself, as the government recognized at the time, the violation indisputably was committed for economic reasons—the defendant had

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[7] See also Pet. App. 90, quoting 16 U.S.C. § 1538(a)(1)(B) ("it is unlawful for any person subject to the jurisdiction of the United States to * * * take any [listed] species"); *cf.* U.S. Br. (I) (incorrectly implying that this provision regulates "commercial development activities that would result in the taking of endangered" species).

been paid $40 to deliver the gun to another student.[8] As the government admits, the defendant's facial challenge could not have succeeded in *Lopez* if commercial motive were the proper focus. See U.S. Br. 12 ("'a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others'"). *Lopez* dictates that the government's focus on petitioners' commercial motive is wrong.

Moreover, from a practical perspective, the Solicitor General's focus on subjective commercial motive is suspect and unworkable. Though the government argues (at 9) that ESA § 9 has not been applied to conduct undertaken for non-economic purposes, that contention is belied by the facts of this very case.[9] In 1993, early in the government's multi-year effort to restrict GDF's use of its property (an effort carried out in a manner deplored by the district court, see Pet. 8-9), Dr. Fred Purcell was threatened with criminal prosecution merely for clearing trash and brush off his property. Pet. App. 4; (RX E:323). FWS never claimed that Dr. Purcell's "crime" of cleaning up his property was tied to a commercial motive, nor would the record support such a claim. The scope of the government's commerce power—and of the complex ESA regulatory scheme—should not depend on subjective and uncertain assertions regarding motive, particularly where the strict-liability take provision lacks a motive inquiry.

3. Because the government fails to show that cave insect takes have a substantial effect on commerce, they cannot constitutionally be regulated absent aggregation. The court of appeals held that cave insect takes, though non-economic themselves, "may be aggregated with all other ESA takes," reasoning that regulating non-economic takes is "essential"

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[8] See *United States* v. *Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993); *United States* v. *Lopez*, No. 93-1260, Br. for United States 7 (U.S. June 2, 1994).

[9] See also, *e.g.*, *Loggerhead Turtle* v. *County Council*, 92 F. Supp. 2d 1296, 1298-99, 1304-06 (M.D. Fla. 2000) (holding sea turtles "taken" by non-commercial beach driving and beachfront lighting).

to Congress's regulatory scheme to protect "the 'interdependent web' of all species." Pet. App. 35-36. That ruling is erroneous and would leave federal power without limits.

This Court has *never* condoned the aggregation of wholly non-economic activities, as it repeatedly stressed in *Morrison*. See 529 U.S. at 611 n.4 ("in every case where we have sustained federal regulation under *Wickard*'s aggregation principle, the regulated activity was of an apparent commercial character"); *id.* at 613 ("our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature"); *id.* at 611 (only "some sort of economic endeavor" has been aggregated). The only intrastate activities that can be aggregated under the Commerce Clause are those that "arise out of or are connected with a commercial transaction," a test the cave species do not remotely satisfy. *Lopez*, 514 U.S. at 561.

Under the Fifth Circuit's approach, federal power has no discernible limits. Government can regulate every aspect of individuals' lives, from the time they get up in the morning, to what they eat for breakfast, to what hobbies they pursue, because all these affect an "interdependent" web of economic productivity. See *Morrison*, 529 U.S. at 611 ("'any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far'").[10] The unprecedented and limitless form of aggregation used by the Fifth Circuit requires urgent correction by this Court. And this case presents an exceptionally good vehicle to decide whether non-economic intrastate activities may be aggregated; no better example could be found of intrastate and non-economic objects of regulation than the completely isolated, local subterranean insect species at issue here.

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[10] See also *id.* at 616 n.6 ("the but-for causal chain must have its limits in the Commerce Clause area"); *Lopez*, 514 U.S. at 567 (rejecting a "'view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce'").

Rather than defend the Fifth Circuit's aggregation theory, the government argues that "the conduct regulated by Section 9 of the ESA is principally of an economic nature." U.S. Br. 9. But a statute cannot be upheld as a valid regulation of particular economic conduct if that economic conduct is not what the statute purports to regulate. See *Lopez*, 514 U.S. at 561 (stressing that the law in question was "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms"); *Morrison*, 529 U.S. at 610 ("the noneconomic, criminal nature of the conduct at issue was central to our decision" in *Lopez*). Petitioners' commercial motivations are not part of the ESA's statutory scheme, as the court of appeals correctly held. See p. 6, *supra*.

4. The government's remaining arguments on the merits also reflect an extraordinarily expansive view of federal power quite inconsistent with this Court's modern teaching. Far from providing any reason to let the court of appeals' decision stand, these arguments counsel in favor of review.

The government asserts, without supporting citation, that "federal authority to act in th[e sphere of endangered species] is particularly appropriate because systemic obstacles exist to the adoption and enforcement of effective state wildlife-protection measures," and also that every endangered species is "appropriately regarded as a valuable national resource subject to protection by Congress." U.S. Br. 7-8, 11. Characterizing a problem as needing a national solution or deeming an asset of national importance does not, however, make non-commercial activity subject to federal regulation under the Commerce Clause. The commerce power is not a general police power. See *Lopez*, 514 U.S. at 566 ("The Constitution * * * withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation"). It is, furthermore, entirely speculative and frankly disrespectful to sovereign States for the government to assume that States will engage in a "race to the bottom" to

exploit their own environmental assets. U.S. Br. 8. Contrary to this speculation, state governments have acted as leaders in environmental regulation and would doubtless be more active still had the federal government not asserted authority in this area.[11] Under such circumstances, if Congress does have an ability to intrude on States' police powers through legislative fiat, that should be decided in this Court rather than anywhere else.

The government's contention (at 9-10) that "the [commercial] significance of a particular species cannot always be determined at a given point in time" proves too much. If pure speculation about what developments in commerce might occur in the distant future were enough to support federal regulation, the commerce power would be limitless. This Court has never approved conjecture as a principle of Commerce Clause analysis. Indeed, the only case from this Court cited by the government in support of this theory is one that did not involve a Commerce Clause challenge or ESA § 9 at all. U.S. Br. 10 (citing *TVA* v. *Hill*, 437 U.S. 153, 178-79 (1978)). If rank speculation about the future commercial value of an intrastate and non-economic activity is a valid form of Commerce Clause analysis, that principle also should be affirmatively announced by this Court, not applied *sub silentio* as a basis to deny review.

CONCLUSION

For the foregoing reasons and those set forth in the petition and the briefs of *amici curiae*, this Court should grant the petition.

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[11] See Brief of the States of Texas et al. as *Amici Curiae* 14 (collecting statutes and regulations); Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 ENVT'L L. 1, 47-48 (1999); National Governors Association, *Policy NR-12, Endangered Species Act Policy*, http://www.nga.org/nga/legislativeUpdate/policyPositionDetailPrint/1,1390,661,00.html (visited September 13, 2004).

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In the Supreme Court of the United States

GDF REALTY INVESTMENTS, LTD.; PARKE PROPERTIES I, L.P.; AND PARKE PROPERTIES II, L.P.,

Petitioners,

v.

GALE A. NORTON, Secretary of the Interior, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Petitioners file this supplemental brief to address the impact of this Court's recent decision in *Gonzales* v. *Raich*, No. 03-1454 (June 6, 2005), on the questions presented by their petition. *Raich* leaves it as necessary as ever for this Court to decide whether the Commerce Clause permits the U.S. Fish & Wildlife Service to regulate "takes" of intrastate non-economic species under the Endangered Species Act ("ESA"), 16 U.S.C. § 1538(a)(1)(B).

Neither of the factors that foreclosed the Commerce Clause challenge in *Raich*—the "undisputed magnitude of the commercial market for [the regulated activity]" and the "findings in the [Act]" that the intrastate activity had a substantial effect on interstate commerce (slip op. 30)—is present here. Unlike in *Raich* and *Wickard* v. *Filburn*, 317 U.S. 111 (1942), there is no market for intrastate non-economic cave insects, and such insects are not a substitute in any market for other endangered species. Thus, takes of the insects cannot be regulated on the ground that failure to do so would undercut congressional regulation of a national market for a fungible commodity. Nor do Congress's findings in the ESA provide any basis for concluding that takes of intrastate non-economic species substantially affect interstate commerce.

1. In *Raich*, the Court placed the facts of the case in a category it had already squarely addressed in *Wickard*. *Raich*, like *Wickard*, is a case where Congress sought to regulate "portions of [interstate] markets that are supplied with [products] produced and consumed locally." Slip op. 6. As in *Wickard*, the local activities being regulated were an integral "part of an economic 'class of activities'" that substantially affect interstate commerce (*id.* at 13)—local production and consumption of a single "fungible commodity for which there is an established * * * interstate market"—such that "failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity." *Id.* at 15.

In those circumstances, the intrastate activity at issue clearly affected "supply and demand" (slip op. 15) and "price and market conditions" (*id.* at 16) in the regulated interstate market. See *ibid.* (production for home consumption "has a substantial effect on supply and demand in the national market for that commodity"). In *Wickard*, consuming home-grown wheat weakened demand and therefore affected price controls in the national wheat market. 317 U.S. at 127-28. In *Raich*, the high demand for marijuana in the interstate market would predictably divert quantities of home-grown marijuana into that commercial market. Slip op. 16. For this reason, the Court held in both cases that the Commerce Clause authorized regulation of the home-grown commodity.

To describe this holding is to demonstrate why it is not controlling here. Unlike *Raich*, this is not a case where *Wickard*'s "[w]ell-settled law" supports federal regulation. *Raich*, slip op. 6. The cave insects have never been traded in commerce in any form or fashion—legally or illegally. Thus, the cave insects are not a "commodity" and there is no "national market" in them. Because no "supply and demand" or "price and market conditions" for cave insects exist, those conditions cannot be affected by intrastate activity. See Pet. 6. Nor does the activity prohibited by the challenged provision of the ESA—"takes" of cave insects—involve the "production, distribution, [or] consumption" of the protected insects. *Raich*, slip. op. 23.

Furthermore, cave insects are not a substitute for other creatures protected by the ESA in which there may be some market, and no "diversion" of insects into a commercial market is therefore plausible. See *Raich*, slip op. 16. Accordingly, the Court's concerns in *Raich* about the difficulty of defining the class of regulated activity are not present here. *Id.* at 23-30. Because endangered species taken together as a class are not a fungible "commodity," issues of substitution of one for another or of diversion into a commodity market are simply irrelevant to the analysis.

Given that cave insects are neither "articles or commerce" nor in any way related to any commercial market in endangered species, the principle in *Raich* that Congress may rationally prohibit "possession or manufacture of an article of commerce" as a "means of regulating commerce in that product" has no application here. *Raich*, slip op. 23. No amount of aggregating can turn these non-economic, non-commodity, non-fungible insects into part and parcel of an interstate market. Therefore, unlike in *Raich* or *Wickard*, there is no conceivable "rational basis" for concluding that takes of intrastate non-economic species, in the aggregate, substantially affect interstate commerce. *Id.* at 19.

2. Unlike the home-grown marijuana producers and users in *Raich*, Petitioners are not asking this Court to invalidate "'essential part[s] of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.'" *Raich*, slip op. 22 (quoting *United States* v. *Lopez*, 514 U.S. 549, 561 (1995)). It is easy to discern why regulating homegrown marijuana might be considered "an essential part of the larger regulatory scheme" governing Class I drugs. *Id.* at 24. As discussed above, marijuana is a commercial commodity, and "[p]rohibiting the intrastate possession and manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product." *Id.* at 23.

Here, in contrast, cave insects and other intrastate non-economic species are not a commodity. Takes of these species have no effect, direct or indirect, on the survival of species that live in more than one state and have economic value. Thus, federal inability to regulate takes of intrastate non-economic species would have no impact on the broader regulatory scheme of the ESA, and nothing in the ESA's congressional findings (discussed below) or in the record of this case suggests the contrary. Species that are properly protected under the ESA would continue to receive that protection in precisely the same manner and to precisely the same

degree.[1] Because regulating takes of cave insects has not been shown to be "essential" to the vitality of the ESA, such regulation is impermissible under the Commerce Clause.

3. For essentially the same reasons, prohibiting takes of intrastate non-economic species cannot be justified under the Necessary and Proper Clause: that prohibition is not "necessary to make a regulation of interstate commerce effective." *Raich*, slip op. 2 (Scalia, J., concurring in judgment). Neither Congress in the ESA nor the government in this litigation has plausibly suggested how regulation of economically valuable species "'could be undercut unless * * * intrastate'" non-economic species were also federally protected. *Id.* at 4 (quoting *Lopez*, 514 U.S. at 561). Nor have they explained how regulation of intrastate non-economic species is "'reasonably adapted' to the attainment of a legitimate end under the commerce power." *Id.* at 5 (quoting *United States* v. *Darby*, 312 U.S. 100, 121 (1941)); see *id.* at 6 (congressional power "extends only to those measures necessary to make the * * * regulation [of an interstate market] effective"). Regulation of homegrown marijuana was necessary and proper to the regulation of the national market in that "fungible commodit[y]" because homegrown marijuana for personal use "is never more than an instant from the interstate market." *Id.* at 8. No such justification exists for a federal ban on takes of the cave insects, an issue that Texas has explained it is willing and perfectly able to address itself. See Brief of the States of Texas et al. as *Amici Curiae* 13-15.

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[1] For example, the prohibition on taking economic species (*e.g.*, species that are or have been commodities) would continue to be enforceable to supplement the other provisions of 16 U.S.C. § 1538, which outlaw the market for such species. Because there is no market for intrastate non-economic species, however, there is no need to regulate takes of such species under the Commerce Clause in order to avoid "undercut[ting] the regulation of the interstate market in that [species]." *Raich*, slip op. 15.

4. Congress's ESA findings—unlike those in *Raich*, which addressed "the effects of intrastate drug activity on interstate commerce" (slip op. 18 n.32)—do not explain "why Congress deemed it appropriate to encompass local activities within the scope of the [statute]." *Id.* at 17. In the ESA, Congress found that species "have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation," and that such species "are of esthetic, ecological, educational, historical, recreational, and scientific value." 16 U.S.C. § 1531(a)(1), (3). It made no findings whatsoever that the activity regulated by 16 U.S.C. § 1538(a)(1)(B)—"takes" of endangered species—substantially affects interstate commerce. Nor is there any legislative history supporting that conclusion. See Pet. 16.

Furthermore, the findings Congress did make do not focus on the economic or commercial value of endangered species, let alone separately justify reaching intrastate non-economic species traditionally within the regulatory power of the states. While there is no doubt that there exist markets in some endangered species—such as for bald eagles and their parts (*Raich*, slip op. 23 n.36)—Congress's complete failure to refer to such trade in its findings suggests that it did not consider the economic uses of some species to be the basis of its power to enact the ESA's broad prohibition on "taking" such species. Instead, Congress chose to enact separate ESA provisions that explicitly prohibit commerce in endangered species. See Pet. 19 n.7. Those provisions are not at issue here.

This Court has now confirmed that the correct Commerce Clause inquiry—which Congress did not address in its findings—is whether the expressly regulated activity itself "substantially affect[s] interstate commerce." *Raich*, slip op. 13, 16; *id.* at 4 (Scalia, J., concurring in judgment) (whether intrastate activity substantially "interfere[s] with or obstruct[s] the exercise of the [commerce] power"); see Pet. 23-27; Pet.

App. 21-23; Reply Br. 6-7, 9. In this case, the answer to that question is no. The regulated activity is takes of endangered species. Pet. App. 22. As discussed above, takes of cave insects and other intrastate non-economic species do not themselves affect commerce or obstruct an exercise of the commerce power. Congress made no findings to the contrary.

5. Finally, the Court's careful analysis in *Raich* looks nothing like either the Fifth Circuit's reasoning below (aggregating all takes of all endangered species based on a speculative "interdependence of species" analysis, Pet. App. 35) or the D.C. Circuit's reasoning in *Rancho Viejo, LLC* v. *Norton*, 323 F.3d 1062, 1072 (D.C. Cir. 2003) (focusing on the economic activity that resulted in the take). The confusion we described in the petition and reply brief—the circuits' express disagreement on the appropriate method of Commerce Clause analysis, the well-reasoned dissents from respected jurists in every case, and the very closely divided vote to deny *en banc* rehearing here—is unaffected by the Court's decision in *Raich*. The inconsistency of the ruling below with this Court's analysis in *Raich*, *Lopez*, *United States* v. *Morrison*, 529 U.S. 598 (2000), and other controlling precedents is striking, and the blow to our Nation's federalist principles from leaving the decision below unreviewed would be severe. Thus, the need for this Court's immediate intervention remains just as dire, as the numerous *amicus* briefs urging that certiorari be granted attest.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition and reply brief, the Court should grant the petition and decide this case on the merits. Alternatively, the Court should grant the petition, vacate the judgment, and remand this case for reconsideration in light of *Raich*.

Respectfully submitted.

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GDF REALTY INVESTMENTS, LTD.;
PARKE PROPERTIES I, L.P.; AND
PARKE PROPERTIES II, L.P.,

Petitioners,

v.

GALE A. NORTON, SECRETARY
OF THE INTERIOR, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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CONSENTS OF PARTIES TO FILING OF BRIEF BY AMICI CURIAE

The Solicitor General of the United States, representing Respondents, and counsel for Petitioners GDF Realty Investments, Ltd., *et al.*, have consented to the filing of this brief of amici curiae American Farm Bureau Federation and Texas Farm Bureau. The original copies of their written consents accompany this brief.

STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae American Farm Bureau Federation and Texas Farm Bureau respectfully submit this brief on behalf of their members to advance their members' policy views.[1]

The American Farm Bureau Federation ("AFBF") is a voluntary general farm organization formed in 1919. AFBF was founded to protect, promote and represent the business, economic, social and educational interests of American farmers and ranchers. AFBF has member organizations in all fifty states and Puerto Rico, representing more than five million member families.

The Texas Farm Bureau ("TFB") is a Texas non-profit membership corporation committed to the advancement of agriculture and prosperity for rural Texas. TFB has 371,320 members and is associated with independent

[1] Counsel for the American Farm Bureau Federation and the Texas Farm Bureau authored this brief in its entirety; no person or entity other than amici curiae, their members, and their counsel provided any monetary contribution to the preparation or submission of this brief.

county Farm Bureau corporations in 207 different counties across the state, including Travis County, Texas, the situs of the land that is the subject of this appeal.

AFBF and TFB (collectively "Farm Bureau") believe that application of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544, to species that are wholly local and noncommercial ("intrastate") in nature is unconstitutional. ESA section 9 enforcement activity, or threatened enforcement activity, by the United States Fish & Wildlife Service ("USFWS") affects private landowners who have the misfortune to have listed species or merely listed species' habitat on their lands. ESA section 7's consultation requirements also have direct effects on federal permitting and funding programs, especially those of the Departments of Agriculture and Interior, that have a direct impact on Farm Bureau members' interests.

The legal precedents of this case likely will affect many of the members of the Farm Bureau, including but not limited to those who are property owners in Travis County, Texas, the location of the land in question in this case, because the Commerce Clause analysis relied on by the Fifth Circuit panel is of more general applicability than just this case. The Farm Bureau is concerned that its members' agricultural use of their land is not disrupted in the manner or to the extent as was Petitioners' use of their land. Such a disruption would be devastating to the lives of farmers and ranchers, who depend on their land to provide their livelihoods and their homes. The Fifth Circuit panel misapplied the standard for determining whether local, noncommercial species affect interstate commerce sufficiently to establish Commerce Clause

authority for Congress to reach such "intrastate" species under the Endangered Species Act.

SUMMARY OF ARGUMENT

The Endangered Species Act ("ESA") proscribes "takes" of species, which may occur by directly harming an individual member of the species or by adversely affecting the species' habitat. The ESA requires consultation with the United States Fish & Wildlife Service ("USFWS") by federal agencies whose programs or other actions might affect a listed species or its habitat, including programs and actions that affect agriculture. In practice, the ESA has been used by USFWS and private litigants to supplant state and local legislative processes concerning land use and resource allocation. The reach of the ESA is pervasive and disruptive enough without expanding that reach beyond the proper bounds of Congress' Commerce Clause power, to include "purely intrastate" – *i.e.*, local, noncommercial, noneconomic – species.

The Fifth Circuit panel's decision in this case incorrectly concluded that, although the six "cave bugs" at issue themselves have no connection to or effect on interstate commerce and are without commercial or economic character, the ESA is constitutional as applied to them because, when takes of them are aggregated with takes of all other listed species, including species having interstate economic character, the whole has a sufficiently economic character to bring all within the reach of the Commerce Clause. This analysis is flawed, because it aggregates species that are unlike in the relevant quality. The Fifth Circuit panel's aggregation analysis is a merely tautological

exercise, and the result is, of course, presupposed as soon as the relevant universe of aggregable objects is determined so expansively. That determination applies aggregation even though its underlying quantitative assumption – that aggregation is of objects sharing like, relevant qualities – is not met. The panel's approach was qualitatively and quantitatively inconsistent with a proper analysis under *Lopez* and *Morrison*.

ARGUMENT

I. INTRODUCTION

In this as-applied constitutional challenge to the Endangered Species Act, the Court has an opportunity further to refine the limits of Congress' Commerce Clause reach that it undertook in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000). This case presents a situation where a federal statute that results in significant federal regulation of both public and private activity in the United States, and that in practice imposes intrusive and often disruptive land- and resource-use restrictions on both private and public landowners, is applied to objects of regulation that are wholly local and noneconomic in character, departing from this Court's past jurisprudence.

The "purely intrastate" species at issue in this case – six minute "cave bugs" found underground at a location in

the environs of Austin, Texas[2] – are not traded in interstate commerce, do not affect channels of interstate commerce directly or indirectly, and of themselves do not affect interstate commerce, significantly or otherwise. The panel of the Fifth Circuit Court of Appeals itself recognized that the cave bugs have no substantial effect on interstate commerce. *See GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622, 637-38 (5th Cir. 2003). It is only by an analytically flawed invocation of the aggregation principle utilized by this Court in *Wickard v. Filburn*, 317 U.S. 111 (1942), that the Fifth Circuit panel upheld the application of the Endangered Species Act to these cave bugs against Petitioners' constitutional challenge.

II. THE ENDANGERED SPECIES ACT IS PERVASIVE AND DISRUPTIVE ENOUGH WITHOUT EXPANDING ITS REACH BEYOND CONSTITUTIONAL BOUNDS

The Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544, intrudes on public and private activity in the United States in a variety of ways. Agricultural activities are by definition land-use intensive, and farmers' and ranchers' participation in federal programs is substantial. Farmers and ranchers are therefore more directly affected by the ESA than most. The Farm Bureau

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[2] They are: (i) the Bee Creek Cave harvestman, *texella reddelli*; (ii) the Bone Cave harvestman, *texella reyesi*; (iii) the Tooth Cave pseudoscorpion, *tartarocreagris texana*; (iv) the Tooth Cave spider, *neoleptoneta myopica*; (v) the Tooth Cave ground beetle, *rhadine persephone*; and (vi) the Kretschmarr Cave mold beetle, *texamaurops reddelli*. The first four are arachnids; the two beetles are insects. The largest is approximately 7 mm (about 1/4 inch); the smallest is approximately 1.4 mm (about 1/16 inch). They were listed in September 1988.

is concerned that the ESA not be more broadly applied than the Constitution permits.

The impact of the ESA on farmers and ranchers comes primarily from the Act's proscriptions against "takes" of listed species or federal actions contributing to their "jeopardy." Section 9 of the ESA, 16 U.S.C. § 1538, prohibits "takes" of listed species. Through implementing regulations, a "take" may include adverse effects on a listed species' habitat. *See* 16 U.S.C. § 1533 ("take" defined); 50 C.F.R. § 17.3 ("harm" and "harass" defined). In Texas in 1994, for example, it was a United States Fish & Wildlife Service ("USFWS") practice to send letters advising landowners, many of them farmers and ranchers, that their land contained possible habitat for two listed bird species, and that particular of the landowner's activities there might constitute a take. The so-called "bird letters" interfered directly with land use activities, and often affected owners' ability to obtain financing or permits. *See State of Texas v. Babbitt*, No. W-94-CA-271 (W.D. Tex. 1994) (seeking, among other things, to enjoin bird letters; agreed joint order, USFWS practice ceased).

Similarly, in a series of cases beginning in 1991, the Sierra Club and others filed lawsuits whose goal it was to impose federal limitations on the pumping of water from the Edwards Aquifer in central Texas. Sierra Club's theory was that unregulated pumping adversely affected listed species' riverine habitats by causing diminished flows from natural springs fed by the aquifer, so that section 9 takes occurred. These cases involved years of litigation including the City of San Antonio and other Edwards Aquifer-dependent cities, as well as many private landowners in the area, including farmer and rancher defendants. *See Sierra Club v. San Antonio,* 112 F.3d 789, 792-93 (5th Cir.

1997) (describing actions brought by the Sierra Club regarding the Edwards Aquifer); *Sierra Club v. Glickman*, 156 F.3d 606, 610 (5th Cir. 1998) (same); *see also Sierra Club v. Lujan*, No. MO-91-CA-069, 1993 WL 151353 (W.D. Tex. Feb. 1, 1993); *Sierra Club v. Babbitt*, 995 F.2d 571 (5th Cir. 1993); *Sierra Club v. Babbitt*, 81 F.3d 155 (5th Cir. 1996) (Table) (No. 94-50260); *Sierra Club v. San Antonio*, No. MO-96-CA-097 (W.D. Tex. 1996); *Sierra Club v. San Antonio*, 112 F.3d 789 (5th Cir. 1997) (interlocutory appeal of temporary injunction); *Sierra Club v. San Antonio*, 115 F.3d 311 (5th Cir. 1997) (intervention of State of Texas); *Sierra Club v. Glickman*, 82 F.3d 106 (5th Cir. 1996) (intervention of Farm Bureau and State of Texas).

The federal government funds many programs implicating land use, including many that directly affect agriculture; and also must grant permits for many land-use activities. ESA section 7 requires federal agencies to consult with USFWS before any federal action is taken that might increase the likelihood of "jeopardy" to a listed species, *see* 16 U.S.C. §§ 1531, 1536(a)(2), and provides an additional basis for challenging such programs. The Sierra Club has, for example, sued the Secretary of Agriculture under section 7, challenging production flexibility contract payments to farmers made under the Federal Agriculture Improvement and Reform Act of 1996. *Sierra Club v. Glickman*, 156 F.3d 606 (5th Cir. 1998).

This case itself provides a signal example of the intrusiveness and disruptiveness of the ESA into ordinary land-use activities, and the unrelenting difficulty a landowner may face in simply trying to use his or her land in an otherwise normal and accepted manner. To have proposed a hypothetical situation with so many egregious elements would have been implausible.

The point here is not to attack individual provisions of the ESA or its administration, or to question whether there should be legislative changes, but to remind the Court that the ESA intrudes broadly on land and resource use; and that it has been, and likely will continue to be, used to provide a federal judicial forum for land-use and anti-development debates that formerly had resort to state and local legislative and regulatory processes.

This Court has long tempered the federal reach in areas of traditional state regulation – including land use regulation and resource management – based on federalism concerns. *E.g.*, *Morrison*, 529 U.S. at 611 (citing *Lopez*, 514 U.S. at 573-74, 577 (Kennedy, J., concurring)); *id.* at 613, 615; *Lopez*, 514 U.S. at 557 (care not to "obliterate the distinction between what is national and what is local"); *id.* at 564. Those same concerns counsel here that application of the ESA should not extend beyond the proper reach of the Commerce Clause.

III. THE FIFTH CIRCUIT PANEL'S AGGREGATION APPROACH AS APPLIED TO "PURELY INTRASTATE" SPECIES WAS ANALYTICALLY FLAWED

The Farm Bureau does not doubt that, where a listed species that is the object of the statute's application has a clear relationship to interstate commerce, Congress may apply the strictures of the ESA. But the Constitution will not tolerate such a regime when the object of the congressional regulation is an entirely local, noncommercial, noneconomic species. The analytical device of aggregating objects of regulation that are, each by itself, insufficiently connected to interstate commerce to support Commerce Clause reach may be constitutionally permissible where

there is some iota of economic character or some finite connection or consequence to interstate commerce in the individual object. But where, as here, these species' connection to interstate commerce is not merely tenuous but wholly lacking, aggregation must fail. *There is nothing to aggregate.*

The concept underlying aggregation is that, although the importance of a single example may be *de minimis*, the sum of all similar *de minimis* examples may nonetheless constitute a significant total. Aggregation thus is an analytical device that may justify Commerce Clause reach where a would-be object of congressional regulation has a connection to interstate commerce that, by itself, is too small, too tenuous, or too remote to justify regulation, but the effect of all objects of like character in the aggregate *is* sufficient to provide that constitutional justification. In *Wickard*, the justification for concluding that Mr. Wickard's home-use wheat was subject to the Agricultural Adjustment Act of 1938 was that the aggregate of all farmers' home-use wheat would, collectively, be an amount potentially sufficient to distort the market and undermine the price regulation scheme Congress had enacted. *Wickard*, 317 U.S. at 128-29 ("That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others *similarly situated*, is far from trivial.") (emphasis added).

In the case of purely intrastate species, however, aggregation with interstate species is inappropriate to provide a constitutional justification, because all the objects of the aggregation do not each share the relevant character. The aggregation principle contemplates that

each object possesses a quantum of the particular quality sought to be aggregated. To assess whether the cumulative sum of *de minimis* effects collectively constitutes a non-*de minimis* whole, the cumulation must be of *like* effects or qualities. *See, e.g.*, *Wickard*, 317 U.S. at 127-28 ("similarly situated"). Apples, though round and of approximately the same size and weight, do not affect the demand for baseballs.

There are two distinct ways in which the Fifth Circuit panel's aggregation analysis failed this basic logical criterion. First, the cave bugs at issue in this case have neither commercial nor economic character, nor any other connection themselves to interstate commerce. Although explicitly recognizing this, the Fifth Circuit panel aggregated them generally with other listed species that *are* "interstate" in character. *See GDF Realty*, 326 F.3d at 640 ("'interdependent web' of all species"). As Petitioner and this Court have pointed out, this Court has not previously aggregated noneconomic activities with economic ones. Petition at 14-16; *Lopez*, 514 U.S. at 559-60; *Morrison*, 529 U.S. at 611, 612.

Second, the cave bugs were aggregated generally with other objects of ESA regulation that are *not of like kind*. In *Wickard*, Mr. Wickard's wheat was aggregated generally with other *wheat* that also had been produced for home consumption. Mr. Wickard's wheat was not aggregated with home-use barley or sorghum, or butter or chickens. It is unclear why cave bugs should be aggregated with, say, red wolves, spotted owls, red-cockaded woodpeckers, grizzly bears or whooping cranes. The indiscriminate, non-quality-specific aggregation employed by the Fifth Circuit panel provides no test at all; it is tautological, and reduces

to a litmus merely requiring a would-be listed species to be alive in order to be subject to congressional power.

In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001), this Court examined the specific character of the abandoned gravel pits into which the waste agency wished to discharge dredge or fill material, and declined to find that the proposed discharge into pits which had no connection to interstate commerce required a Clean Water Act section 404(a) permit merely because waterfowl protected by the Corps of Engineers' "Migratory Bird Rule" stopped there during their migration. 531 U.S. at 171-72, 174. Similarly, here the focus should be on each particular species in question and its specific character to determine the quality to be aggregated, and not on the character of all other species which the ESA might reach. For the cave bugs, that common quality and character is their "purely intra-state" character – local, noneconomic, noncommercial and not affecting interstate commerce.

The proper question for the Fifth Circuit panel thus should have been, at most, whether aggregation of all takes of "purely intrastate" species produces a non-de minimis effect on interstate commerce.[3] Had the Fifth Circuit panel asked this question instead, it would have reached a different result.

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[3] This question is itself likely too broadly framed. The relevant aggregation might better be based on qualities more specific than "intrastate" character alone. More appropriate aggregation might be of "intrastate" invertebrate subterranean species; or, more consistent with the Act's ecosystem approach, invertebrate subterranean species within the particular ecosystem.

The "like kind" and "economic-noneconomic" errors were *qualitative* deficiencies of the panel's analysis. The panel also failed to constrain its aggregation in order to be consistent with the principle's underlying *quantitative* premise: Individual instances to be aggregated each must have some iota of the quality sought to be aggregated. *Cf. Lopez*, 514 U.S. at 560-61 (statute, having "nothing to do with 'commerce' or any sort of economic enterprise, . . . cannot, therefore, be sustained under our cases upholding regulations of activities, . . . , which viewed in the aggregate, substantially affect[] interstate commerce."); *Morrison*, 529 U.S. at 610, 613 ("Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity.").

Unless each object to be aggregated has a quantum of that particular character, however, there is nothing to aggregate. *See Lopez*, 514 U.S. at 567 ("possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce"); *Morrison*, 529 U.S. at 611 n.4, 613. In *Wickard*, each small farmer's quantity of home-use wheat itself had a small but "non-zero" potential to distort the wheat market and defeat the congressional price maintenance program. That was the point: Added together, hundreds or thousands, perhaps millions, of such contributions, each admittedly *de minimis*, nonetheless could constitute a total volume of wheat significant enough to undermine the statutory scheme unless made subject to it. In *Wickard*, the sum of the individual *de minimis* contributions was finite (*i.e.*, non-zero) and significant. *Wickard*, 317 U.S. at 127-28.

Here, however, the cave bugs lack that individual quantitative contribution. As with other "purely intra-state" species, the cave bugs have *no* economic character

whatever. They have *no* connection whatever to interstate commerce, *no* influence on channels of interstate commerce, and *no* effect on interstate commerce. The quantitative contribution of these cave bugs is not merely *de minimis* – it is *zero.* Aggregation cannot sensibly be applied in this situation, because *the sum of zeros is itself zero*. You cannot get something from nothing.

For these reasons, the Fifth Circuit panel's reasoning that, by aggregation with all other listed species, the cave bugs come within the Commerce Clause reach of Congress was inappropriate. The panel's approach provides no discriminant at all. It yields, *ipso facto*, the conclusion that *all* species are within Congress' Commerce Clause reach, without considering their individual specific characters as objects of the activity to be regulated. Were all listed species purely intrastate except one, the panel's analysis would still conclude that all are proper subjects of Commerce Clause regulation under the ESA.

That analysis is, however, fundamentally inconsistent with *Lopez* and *Morrison*, each of which looked to the character of the particular activity to be regulated in determining whether the Commerce Clause justified the regulation. Those cases did not indulge an analysis that credits too-remote "but for" causal connections between the activity to be regulated and interstate commerce. In *Lopez*, this Court rejected the argument that possession of a gun in a school zone may result in violent crime, which in turn might affect the national economy by increasing societal costs (including insurance costs), inhibiting interstate travel, and threatening the educational process, all resulting in a less productive society. 514 U.S. at 563-64;

see also id. at 567 (unwilling to "pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power"). In *Morrison*, this Court likewise rejected congressional findings in support of portions of the Violence Against Women Act – that gender-motivated violence would deter interstate travel, discourage employment and transaction of business in places in which interstate commerce occurred, diminish national productivity, increase medical costs, and so on – as an attempt to "follow the but-for causal chain . . . to every attenuated effect upon interstate commerce." 529 U.S. at 615.

In this case, the legitimate reach of the ESA to "interstate" species will not be imperiled by denying ESA application to the cave bugs; the ESA was being applied before these cave bugs were discovered, and their omission from its reach now will not prevent continued application of the ESA to interstate species.

The cave bugs thus are not an "essential part" of the ESA. *See Lopez*, 514 U.S. at 561. The Fifth Circuit panel's reasoning in assuming so, *see GDF Realty*, 326 F.3d at 640 ("our analysis of the interdependence of species compels the conclusion that regulated takes under ESA do affect interstate commerce"), artificially appends "intrastate" species, which lack any connection of their own to interstate commerce, to a regulatory scheme that properly reaches only "interstate" species, simply because

these two classes have in common that each comprises living organisms. But this flawed transitivity[4] is the basis of an argument *reductio ad absurdum*. "Intrastate" species do not become "interstate" species because they share some *other* quality with "interstate" species than an economic character or that a "take" would have a direct effect on interstate commerce. Similar reasoning would permit congressional regulation of everything, on the rubric that all things are, after all, made up of atomic and subatomic particles, at least some of which – the ones in trucks and interstate goods, for example – clearly have a substantial effect on interstate commerce.

[4] The transitive reasoning is, in effect: The congressional Commerce Clause power can reach "interstate" species; both "interstate" and "intrastate" species are species; therefore, the Commerce Clause can reach "intrastate" species. *See GDF Realty*, 326 F.3d at 640.

CONCLUSION

The Fifth Circuit panel's application of the aggregation principle to conclude that the cave bugs in this case are within the reach of Congress' Commerce Clause power was inappropriate. The facts of this case concerning the character of the cave bugs are simple, so it provides a good opportunity for this Court to address the manner in which aggregation may be employed. This Court should grant Petitioners' request for a writ of certiorari, in order to consider and instruct on the proper constitutional limits of aggregation as a tool of analysis in Commerce Clause cases.

Respectfully submitted,

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IN THE

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GDF REALTY INVESTMENTS, LTD., *ET AL.*

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to the United States Court of Appeals
For the Fifth Circuit

BRIEF OF *AMICUS CURIAE* THE CLAREMONT INSTITUTE CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF THE PETITIONER

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QUESTIONS PRESENTED

1. Whether the Fish & Wildlife Service violated the Commerce Clause by regulating "takes" of intrastate, non-economic species under the Endangered Species Act.

2. Whether aggregation of all takes of all endangered species may sustain the regulation of intrastate, non-economic species whose takes, considered alone, do not substantially affect interstate commerce.

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BRIEF OF *AMICUS CURIAE* THE CLAREMONT INSTITUTE CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF THE PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

The Claremont Institute for the Study of Statesmanship and Political Philosophy is a non-profit educational foundation whose stated mission is to "restore the principles of the American Founding to their rightful and preeminent authority in our national life," including the principle, at issue in this case, that We the People delegated to the national

[1] The Claremont Institute Center for Constitutional Jurisprudence files this brief with the consent of all parties. The letters granting consent have been previously filed or are being filed concurrently. No counsel for a party authored this brief in whole or in part. No person or entity, other than *amicus curiae*, its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

government only certain, specifically enumerated powers and that the bulk of sovereign power, including the police power at issue here, was reserved to the States or to the people.

The Institute pursues its mission through academic research, publications, scholarly conferences, and the selective appearance as *amicus curiae* in cases of constitutional significance. Of particular relevance here, the Institute has a Center for Local Government, which promotes the theory and practice of self-government, emphasizing the themes of limited, constitutional government, federalism, property rights, and energetic citizenship. In addition, the Institute has published extensively about the constitutional limitations on the powers delegated to the national government, including a book edited by Gordon Jones and Institute Senior Fellow John Marini entitled *The Imperial Congress: Crisis in the Separation of Powers.*

In order to further advance its mission, the Claremont Institute in 1999 established an in-house public interest law firm, the Center for Constitutional Jurisprudence. The Center's purpose is to further the mission of the Claremont Institute through strategic litigation, including the filing of *amicus curiae* briefs in cases such as this that involve issues of constitutional significance going to the heart of the founding principles of this nation. The Center for Constitutional Jurisprudence has previously participated as *amicus curiae* before this Court in related cases addressing the scope of Congress's powers under the Commerce Clause: *Solid Waste Agency of Northern Cook Cty.* v. *U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); and *United States* v. *Morrison*, 529 U.S. 598 (2000).

REASONS FOR GRANTING THE WRIT

I. The Federal Government's Regulation of the Wholly Intrastate, Non-Commercial Species at Issue Here Exceeds Congress's Powers Under the Commerce Clause, Both as Originally Understood and As Recently Interpreted by this Court.

A. As originally conceived, Congress's power under the Commerce Clause was limited to the regulation of interstate trade.

For our nation's Founders, "commerce" was trade, and "commerce among the states" was interstate trade, not the ordinary activities of business enterprises in a single state or community. *See, e.g.*, *Corfield* v. *Coryell*, 6 F. Cas. 546, 550 (C.C.E.D.Pa. 1823) (Washington, J., on circuit) ("Commerce with foreign nations, and among the several states, can mean nothing more than intercourse with those nations, and among those states, for purposes of trade, be the object of the trade what it may"); *United States* v. *Lopez*, 514 U.S. 549, 585 (1995) (Thomas, J., concurring) ("At the time the original Constitution was ratified, "commerce" consisted of selling, buying, and bartering, as well as transporting for these purposes"). Indeed, in the first major case arising under the clause to reach this Court, it was contested whether the Commerce Clause even extended so far as to include "navigation." Chief Justice Marshall, for the Court, held that it did, but even under his definition, "commerce" was limited to "intercourse between nations, and parts of nations, in all its branches." *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 190 (1824); *see also Corfield,* 6 F. CAS., at 550 ("Commerce . . . among the several states . . . must include all the means by which it can be carried on, [including] . . . passage over land through the states, where such passage becomes necessary to the commercial intercourse between the states").

The *Gibbons* Court specifically rejected the notion "that [commerce among the states] comprehend[s] that commerce,

which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States." *Gibbons*, 22 U.S., at 194 (quoted in *Morrison*, 529 U.S., at 616 n.7). In other words, for Chief Justice Marshall and his colleagues, the Commerce Clause did not even extend to trade carried on between different parts of a state. The notion that the power to regulate commerce among the states included the power to regulate other kinds of business activity such as hunting or trapping (assuming that the hunting and trapping referenced by the Court of Appeals was for business rather than recreational purposes), therefore, was completely foreign to them. And *a fortiori*, any claim that the Commerce Clause encompassed a power effectively to trump local land use regulations and local development merely because of the presence of a couple of wholly intrastate species of bugs that have never been articles of commerce would have been beyond the pale.

This understanding of the Commerce Clause continued for nearly a century and a half. Manufacturing was not included in the definition of commerce, held the Court in *United States* v. *E.C. Knight Co.*, 156 U.S. 1, 12 (1895), because "Commerce succeeds to manufacture, and is not a part of it." "The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce . . . ." *Id.*, at 13; *see also Kidd* v. *Pearson*, 128 U.S. 1, 20 (1888) (upholding a state ban on the manufacture of liquor, even though much of the liquor so banned was destined for interstate commerce). Neither were retail sales included in the definition of "commerce." *See The License Cases*, 46 U.S. (5 How.) 504 (1847) (upholding state ban on retail sales of liquor, as not subject to Congress's power to regulate interstate commerce); *see also A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 542, 547 (1935) (invalidating federal law regulating in-state retail sales of poultry that originated out-of-state and fixing the

hours and wages of the intrastate employees because the activity related only indirectly to commerce).

For the Founders and for the Courts which decided these cases, regulation of such activities as retail sales, manufacturing, and agriculture (as well as building construction, at issue here), was part of the police powers reserved to the States, not part of the power over commerce delegated to Congress. *See, e.g., E.C. Knight*, 156 U.S., at 12 ("That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the State") (citing *Gibbons*, 22 U.S. (9 Wheat.), at 210; *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419, 448 (1827); *The License Cases*, 46 U.S. (5 How.), at 599; *Mobile Co.* v. *Kimball*, 102 U.S. 691 (1880); *Bowman* v. *Railway Co.*, 125 U.S. 465 (1888); *Leisy* v. *Hardin*, 135 U.S. 100 (1890); *In re Rahrer*, 140 U.S. 545, 555 (1891); *Baldwin* v. *Fish and Game Comm'n of Mont.*, 436 U.S. 371 (1978). And, as the Court noted in *E.C. Knight*, it was essential to the preservation of the States and therefore to liberty that the line between the two powers be retained:

> It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for, while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government....

156 U.S., at 13; *see also Carter* v. *Carter Coal Co.*, 298 U.S. 238, 301 (1936) (quoting *E.C.* Knight); *Garcia* v. *San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 572 (1985) (Powell, J., dissenting, joined by Chief Justice Burger and Justices Rehnquist and O'Connor) ("federal overreaching under the Commerce Clause undermines the constitutionally

mandated balance of power between the States and the Federal Government, a balance designed to protect our fundamental liberties").

While these decisions have since been criticized as unduly formalistic, the "formalism"—if it can be called that at all—is mandated by the text of the Constitution itself. *See, e.g., Lopez*, 514 U.S., at 553 ("limitations on the commerce power are inherent in the very language of the Commerce Clause") (citing *Gibbons*). And it is a formalism that was recognized by Chief Justice Marshall himself, even in the face of a police power regulation that had a "considerable influence" on commerce:

> The object of [state] inspection laws, is to improve the quality of articles produced by the labour of a country; to fit them for exportation; or, it may be, for domestic use. They act upon the subject before it becomes an article of . . . of commerce among the States, and prepare it for that purpose. They form a portion of that immense mass of legislation [reserved to the States]. . . . No direct general power over these objects is granted to Congress; and, consequently, they remain subject to State legislation.

Gibbons, 22 U.S., at 203; see also *id.*, at 194-95 ("Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. . . . The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State"). As this Court noted in *Lopez*, the "justification for this formal distinction was rooted in the fear that otherwise 'there would be virtually no limit to the federal power and for all practical purposes we would have a completely centralized government." 514 U.S., at 555 (quoting *Schechter Poultry*, 295 U.S., at 548).

As should be obvious, the expansion of the Endangered Species Act to the wholly intrastate, non-commercial species at issue here is not a regulation of "commerce among the states," as that phrase was understood by those who framed and those who ratified the Constitution. GDF Realty seeks to develop some of its land that exists wholly in the State of Texas. Land, of course, is the quintessential thing that does not move in interstate commerce. *See Camps Newfound/ Owatonna* v. *Town of Harrison, Maine*, 520 U.S. 564, 609 (1997) (Thomas, J., dissenting).

To be sure, once its development was completed, GDF Realty planned to sell or lease some of its developed property to those engaged in retail sales (other portions of its planned development were destined for residential housing). Some of the goods sold in those retail outlets may well have traveled in interstate commerce, but the regulation at issue here does not address the interstate shipment of goods—the ESA's restrictions on the interstate shipment of endangered species, which are a valid exercise of the Commerce Clause power, are not at issue here. *See* 15 U.S.C. § 1538(a)(1)(E) (making it unlawful to transport endangered species in interstate or foreign commerce). Nor does the regulation at issue here address retail sales of goods that have moved in interstate commerce. It does not address construction of the buildings in which those retail goods will be sold. It does not even directly address the preparation of the land on which those buildings will ultimately be constructed. Rather, it aims at any activity, without regard to its commercial nexus, that might cause "harm" to some cave bugs that never have been articles of commerce, and thereby indirectly regulates a wholly intrastate business enterprise whose activity is 4 steps removed from the Founders' understanding of "commerce among the states."

Despite this most tenuous connection to interstate commerce as originally understood, the Department of Justice nevertheless takes issue in its opposition to the

petition for certiorari with the portion of the Fifth Circuit's opinion holding that the mere fact that GDF Realty is a business is not a sufficient ground for the assertion of federal regulatory authority over matters having nothing to do with interstate commerce. *GDF Realty* v. *Norton*, Brief of the United States in Opposition to Petition for Writ of Certiorari, at 12 n.5. The Department's repudiation of part of the Fifth Circuit's holding—a holding admittedly in conflict with the D.C. Circuit's holding in *Rancho Viejo, LLC* v. *Norton*, 323 F.3d 1062 (D.C. Cir. 2003), *reh'g en banc denied*, 334 F.3d 1158 (D.C. Cir. 2003), *cert. denied*, 124 S.Ct. 1506 (Mar. 1, 2004), *reh'g denied*, 124 S.Ct. 2061 (April 19, 2004)—alone warrants this Court's attention.

Yet even if that aspect of the Fifth Circuit's decision was not in conflict with the D.C. Circuit's decision in *Rancho Viejo*, the circle-of-life rationale upon which the Fifth Circuit ultimately based its decision upholding the expansion of the Endangered Species Act at issue here brings this regulation no closer to the Founders' understanding of the Commerce Clause than does the Department of Justice's rationale—at least, if the Commerce Clause is to retain any of the limits envisioned by our nation's Founders. The Texas cave bugs that the federal government seeks to regulate are not articles of commerce, so the regulations at issue here are readily distinguishable from regulations designed to protect species that actually are articles of commerce. *See* Black Bass Act, ch. 346, 44 Stat. 576 (1926), (repealed by Act of Nov. 16, 1981, Pub. L. No. 97-79, § 9(b)(2), 95 Stat. 1079 (1981)); Bald Eagle Protection Act, ch. 278, 54 Stat. 250 (1940) (16 U.S.C. 668 et seq.).

Nor can this regulation be sustained as a valid exercise of Congress's powers under the Necessary and Proper Clause. As has long been recognized, that clause gives Congress power over the means it will use to give effect to its enumerated powers; it does not serve as an end power unto itself. *See, e.g., Gibbons*, 22 U.S. (9 Wheat.), at 187

(describing the phrase "necessary and proper" as a "limitation on the means which may be used"); *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 324 (1819) (describing the Necessary and Proper Clause as merely a means clause). There has to be a regulation of commerce to which Congress hopes to give effect when it acts pursuant to the Necessary and Proper Clause, and there is no such regulation here, because the cave bugs are simply not articles of commerce. Congress cannot use a Commerce Clause pretext, therefore, to support its exercise of what is essentially a police power. *Id.*, at 423. Thus, while it is undoubtedly true that, in today's world, the quantum of "commerce among the states" is much larger than in the founding era, the expansion in *quantity* does not give Congress the different *qualitative* power that it seeks to exercise here.

Under the original view of the Commerce Clause, therefore, this is an extremely easy case, and the fact that the lower courts are simply refusing to enforce the limits of the Commerce Clause, particularly in an area of such traditional State concern as local land regulation and wildlife protection, warrants this Court's review.

B. Even under the expanded view of the Commerce Clause taken in this Court's modern-era precedents, the expansion of the Endangered Species Act at issue here exceeds the outer limits of the power afforded to Congress.

Even when this Court expanded the original understanding of the Commerce Clause in order to validate New Deal legislation enacted in the wake of the economic emergency caused by the Great Depression, it was careful to retain certain limits lest the police power of the States be completely subsumed by Congress.

Thus, in *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, this Court stated that the power to regulate commerce among the states "must be considered in the light of our dual system of

government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." 301 U.S. 1, 37 (1937) (quoted in *Lopez*, 514 U.S., at 557; *Morrison*, 529 U.S., at 608). Similarly, Justice Cardozo noted in *Schechter Poultry* that "[t]here is a view of causation that would obliterate the distinction of what is national and what is local in the activities of commerce." 294 U.S., at 554 (Cardozo, J., concurring) (quoted in *Lopez*, 514 U.S., at 567; *Morrison*, 529 U.S., at 616 n.6).

These reservations were key to this Court's decisions in *Lopez* and *Morrison*. *See Lopez*, 514 U.S., at 566; *Morrison*, 529 U.S., at 608. As in those cases, the expansion of the Endangered Species Act at issue here does not regulate the channels or the instrumentalities of interstate commerce. Instead, the Court of Appeals based its decision on the claim that federal regulation of any activity that affected even a single, wholly intrastate, non-commercial species was permissible because, due to the interdependence of species, such harm to a single species, when aggregated with unrelated harm to all other species (including commercial species), could reasonably be thought to have a "substantial effect" on interstate commerce. *GDF Realty Investments, Ltd.* v. *Norton*, 326 F.3d 622, 640 (5th Cir. 2003), *reh'g en banc denied*, 362 F.3d 286 (5th Cir. 2004). Quite apart from the fact that one of the unique features of the particular species at issue here is that they are *not* interconnected with other species, the Fifth Circuit's rationale, like a ripple of water spreading throughout an entire pond, would leave nothing outside the scope of federal power. *See Lopez*, 514 U.S., at 567. As this Court has made clear, rationales for the exercise of Commerce Clause power that have no stopping point, and that as a result would displant State policy-making authority, cannot be sustained. *See id.* (rejecting an

"inference upon inference" assertion of power that would "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States"); *Morrison,* 529 U.S., at 615.

Thus, even under the expanded view of the Commerce Clause that has been in place since the New Deal, the expansion of the Endangered Species Act proffered by the government remains what it would have been for Chief Justice Marshall: A pretext for the exercise of police powers by Congress, powers that were and of right ought to be reserved to the States, or to the people.

Judge Jones' opinion dissenting from the denial of the petition for rehearing *en banc* in this case also highlights how fundamentally—despite their contradictory reasoning—the Fifth Circuit's decision here and the D.C. Circuit's decision in *Rancho Viejo* are at odds with this Court's decision in *Lopez*, *Morrison*, and *Solid Waste Agency of Northern Cook County. v. U. S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"). The Fifth Circuit "panel's 'interdependent web' analysis of the Endangered Species Act," she wrote, "gives ... subterranean bugs federal protection that was denied the school children in *Lopez* and the rape victim in *Morrison*." *GDF Realty*, 362 F.3d, at 287 (Jones, J., dissenting from denial of petition for rehearing *en banc*). Judge Jones properly concluded that "the panel's commerce clause analysis is in error," and later that the panel's broad interpretation of the aggregation principle "would not only sustain every conceivable application of the ESA, but entirely undercuts *Lopez* and *Morrison*." *Id.*, at 287, 289. *See also id.* at 292 n.6 (noting that the panel's decision is also "contrary" to *SWANCC*).

As the facts of this case make amply clear, the protection of the health, safety, and welfare of the people—the traditional definition of the police power reserved to the States, *see, e.g., South Covington & C. St. R. Co. v. City of*

Covington, 235 U.S. 537, 546 (1915)—requires a careful balancing of competing concerns, a balancing that is best left to the people and governments who will most directly bear the consequences of the decision. *See, e.g., Escanaba & Lake Michigan Transp. Co.* v. *City of Chicago*, 107 U.S. 678 (1883) (noting that the police power "can generally be exercised more wisely by the states than by a distant authority"). Here, the preservation of some cave bugs is pitted against the construction of the residential housing and businesses necessary to the people who would make their homes in the area surrounding Austin, Texas. *See* Petn., at 10.

The local governmental authorities had already given full consideration to (and approved) GDF's proposed developments before the federal government even added cave bug species to its endangered list. Pet'n at 6. That approval process required GDF Realty to invest millions of dollars toward the construction of water lines, wastewater gravity lines, and other utility infrastructure improvements which were then deeded to the City of Austin, Texas. *Id.* GDF Realty had deeded portions of its land to the Travis County government as a highway right-of-way. *Id.* And it had obtained approval for its platt maps and development plans, *id.*, undoubtedly after undertaking the numerous environmental and safety studies that are the hallmark of modern-day land-use planning.

The process described above demonstrates the proper exercise of the state police powers in action. Given this Court's recent solicitude for the sovereignty of the States, *see, e.g., Printz* v. *United States*, 521 U.S. 98 (1997); *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996); *Alden* v. *Maine*, 527 U.S. 706 (1999); *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627 (1999), it would be odd indeed if Congress could intrude upon the powers

reserved to the States, and hence on state sovereignty, in the much more substantial way presented by the expansion of the Endangered Species Act at issue here.

That does not mean that without comprehensive and expansive federal regulation, a State, through the exercise of its police powers, could immunize actions that have a detrimental effect in other states. Traditional tort and nuisance law remains available. *See, e.g., Brzonkala v. Virginia Polytechnic Institute and State University*, 169 F.3d 820, 840 (4th Cir. 1999), *aff'd sub nom, United States* v. *Morrison*, 529 U.S. 598 (2000); *Missouri* v. *Illinois.*, 180 U.S. 208 (1901). Even for species that migrate between two or more States, the States remain free to enter into agreements to regulate species takes to their mutual benefit. *See, e.g., Virginia* v. *Tennessee*, 148 U.S. 503, 518 (1893) (describing an agreement to drain a malarial district on the border between two States as an example of an interstate agreement that could "in no respect concern the United States"). And on the chance that such an agreement might be made to the detriment of other states, the Congressional consent requirement of the Compacts Clause of Article I, Section 10 provides a sufficient check. U.S. Const., Art. I, Sec. 10, cl. 3 ("No State shall, without the consent of Congress, . . . enter into any agreement or compact with another State, or with a foreign power"); *see also West Virginia ex rel. Dyer* v. *Sims*, 341 U.S. 22, 27 (1951) ("A compact is more than a supple device for dealing with interests confined within a region. . . . [I]t is also a means of safeguarding the national interest.").

In short, there is as little need for federal regulation here as there is constitutional authority. That federal officials in Washington, D.C., might weigh the various police power concerns differently than the people of Texas provides no constitutional title for them to do so, especially where, as here, the benefits and costs on both sides of the health, safety and welfare equation are almost exclusively borne by the

people of Texas. Our Constitution leaves such decisions to the States for good reason. The inference-upon-inference reasoning of the federal government and the Court of Appeals below should not be allowed to alter that fundamental constitutional structure.

C. This Court Should Grant the Writ of Certiorari in order to repudiate the aggregation principle of *Wickard* v. *Filburn*, thereby removing from Congress and the regulatory agencies the remotely colorable claim to unconstitutional assertions of power that it provides.

More fundamentally, the decision by the Court of Appeals below demonstrates just how pernicious the combination of the aggregation principle from *Wickard* v. *Filburn*, 317 U.S. 111, 127-28 (1942), and the substantial effects test discussed in *Lopez* really is. Standing alone, the substantial effects test essentially converts the Necessary and Proper Clause from a means clause to an ends clause, and therefore renders it constitutionally suspect. *See Lopez*, 514 U.S., at 584-85 (Thomas, J., concurring); *M'Culloch*, 17 U.S. (4 Wheat.), at 423; *Carter Coal*, 298 U.S., at 317 (Hughes, C.J., separate opinion). But when combined with *Wickard*'s aggregation principle, there is absolutely nothing over which clever lawyers and bureaucrats in federal regulatory agencies cannot stake some claim of regulatory power, as this case amply demonstrates.

Striking down the expanded interpretation of the Endangered Species Act at issue here is not enough. *Lopez* has been on the books for almost ten years, yet federal agencies have persisted in asserting jurisdiction where, under any reasonable reading of *Lopez*, they have none. The potential for unlimited and abusive assertions of power is the reason that many constitutional scholars over the past half century have criticized *Wickard* as extra-constitutional, even those who favor the resulting expansion in federal powers.

See, e.g., R. BERGER, FEDERALISM: THE FOUNDERS' DESIGN 148-51 (1987); R. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 56-57 (1990) (explaining that *Wickard* "abandoned" aspects of the Constitution that defined and limited national power); R. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 139 (1992) (contending that *Wickard* was a "manifestly erroneous" decision that left "no conceivable stopping point for the federal commerce power"); L. Graglia, *United States v. Lopez: Judicial Review Under The Commerce Clause*, 74 TEX. L. REV. 719, 745 (1996) (referring to *Wickard* as a "notorious" decision); C. Sunstein, *Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV. 247, 253 & n.18 (1996) (describing *Wickard* as a "repudiation" of the original Constitution that gave the national government "something close to general police powers"); B. Ackerman, *Liberating Abstraction*, 59 U. CHI. L. REV. 317, 322, 324 (1992) (describing *Wickard* as a "wrenching break with the constitutional past," ringing the "death-knell for traditional notions of limited national govern-ment"); *cf.* L. TRIBE, AMERICAN CONSTITUTIONAL LAW, Vol. 1, p. 831 n.29 (3d ed. 2000) (describing hypothetical "sham" legislation that could result from the combination of the substantial effects test and the aggregation principle); G. GUNTHER & K. SULLIVAN, CONSTITUTIONAL LAW 191 (13th ed. 1997) (suggesting that *Wickard* "in effect abandon[ed] all judicial concern with federalism-related limits on congressional power"). The expansion of federal power that has followed on the *Wickard* decision and the concomitant retraction of liberty, not just in this arena but in numerous others, suggests that the time is long overdue for a reversal of that decision. *See Lopez*, 514 U.S., at 585 (Thomas, J., concurring). Nothing short of a full repudiation of that decision will suffice to rebuild the limits of the Commerce Clause and to reign in a federal government that continues to believe that the Constitution sets no bounds on its power.

II. The Fifth Circuit's Rationale Conflicts with that of the D.C. Circuit in *Rancho Viejo* v. *Norton*.

In his opinion dissenting from the denial of the petition for rehearing *en banc* in *Rancho Viejo*, Judge Sentelle noted that the reasoning upon which the D.C. Circuit grounded its ruling was "conspicuously in conflict" with the reasoning of the Fifth Circuit in the case below. *See Rancho Viejo*, 334 F.3d, at 1159 (Sentelle, J., dissenting from denial of petition for rehearing *en banc*). There are several grounds of disagreement that merit this Court's attention.

First, and perhaps most fundamentally, the two courts disagree as to whether the prohibition on the "take" of wholly-intrastate, non-commercial species can be viewed as aimed at economic activity simply because the particular litigant is an economic actor. The D.C. has held that it could, while the Fifth Circuit held that it could not. *Compare National Ass'n of Home Builders* v. *Babbitt*, 130 F.3d 1041, 1049 (D.C. Cir. 1997) with *GDF Realty*, 326 F.3d, at 634-35.

Second, the D.C. Circuit and the Fifth Circuit disagree as to whether this Court's decision in *United States* v. *Salerno*, 481 U.S. 739 (1987), prevents a facial challenge on Commerce Clause grounds to any statute that reaches some commercial activity. As Judge Roberts noted in his dissent from the denial of the petition for rehearing *en banc* in *Rancho Viejo*, "the approach [regarding *Salerno*] of the panel in this case . . . now conflicts with the opinion of [the Fifth Circuit] . . . ." *See Rancho Viejo*, 334 F.3d, at 1160 (Roberts, J., dissenting from denial of petition for rehearing *en banc*) (quoting *GDF Realty*, 326 F.3d, at 636). The D.C. Circuit relied upon *Salerno* despite the obvious inconsistency between *Salerno* and *Lopez*. The Fifth Circuit, in contrast, rejected the applicability of *Salerno* in the post-*Lopez* Commerce Clause context. *GDF Realty*, 326 F.3d, at 635-36.

The two circuit courts also disagree over the application of this Court's aggregation principle. While the D.C. Circuit

aggregates all of the activity engaged in by the regulated litigant, *Rancho Viejo*, 323 F.3d, at 1070, the Fifth Circuit held below that "[i]n light of *Lopez* and *Morrison* the key question for purposes of aggregation is whether the nature of the regulated activity is economic," *GDF Realty*, 326 F.3d, at 630. The Fifth Circuit recognized that this Court in "*Morrison* noted, for aggregation purposes, the importance of the economic nature of the regulated activity" when it specifically acknowledged that it had heretofore aggregated intrastate activity "*only* where the activity *is economic in nature*." *GDF Realty*, 326 F.3d, at 630 (emphasis in original) (quoting *Morrison*, 529 U.S., at 613 (emphasis added)). To allow aggregation of "noneconomic and noncommercial activity" "so long as, if aggregated," there would be "a substantial effect" on commerce, held the Fifth Circuit, "would vitiate *Lopez* and *Morrison*'s seeming requirement that the intrastate instance of activity be commercial." *GDF Realty*, 326 F.3d, at 638. "*Lopez* and *Morrison* stand against such a proposition." *Id.*

The D.C. Circuit, in contrast, relying on the identical passage from *Morrison*, implied that this Court had rejected a categorical rule, thus permitting the aggregation of non-economic activity in order to demonstrate a substantial effect on commerce. *Rancho Viejo*, 323 F.3d, at 1071-72; *see also United States v. Rodia*, 194 F.3d 465, 481 (3rd Cir. 1999) ("the specific activity that Congress is regulating need not itself be objectively commercial, as long as it has a substantial effect on commerce"); *cf. United States v. Bongiorno*, 106 F.3d 1027, 1031 (1st Cir. 1997) (noting that the Court consistently has interpreted the Commerce Clause "to include transactions that might strike a lay person as 'noncommercial'").

The Fifth Circuit's position is not only a better reading of *Morrison*, but it is in accord with decisions of the First, Second, Third, Fourth, Ninth, and Eleventh Circuits as well. *See United States v. Zorilla*, 93 F.3d 7, 8 (1st Cir. 1996);

United States v. Holston, 343 F.3d 83, 88 (2nd Cir. 2003); *Freier v. Westinghouse Electric Corp.*, 303 F.3d 176, 200-03 (2nd Cir. 2002), *cert. denied*, 538 U.S. 998 (2003) ; *United States v. Whited*, 311 F.3d 259, 271 (3rd Cir. 2002), *cert. denied*, 538 U.S. 1065 (2003) ; *Gibbs v. Babbitt*, 214 F.3d 483, 491 (4th Cir. 2000); *United States v. McCoy*, 323 F.3d 1114, 1119-20 (9th Cir. 2003); *United States v. Cortes*, 299 F.3d 1030, 1035 (9th Cir. 2002); *United States v. Ballinger*, 312 F.3d 1264, 1270 (11th Cir. 2002).

Finally, the two circuit courts disagree with respect to which effects on interstate commerce are simply too attenuated to support the exercise of Commerce Clause power. The Fifth Circuit below rejected the government's claim that Cave Bugs "play a role in interstate commerce" because "some scientists" "have traveled to Texas" to study the Cave Bugs and "articles about the Cave Bugs have been published in scientific journals." *GDF Realty*, 326 F.3d, at 637. In stark contrast, and despite the admonition by this Court in *SWANCC* that even a billion dollar bird hunting and watching tourism trade was likely too attenuated a connection to interstate commerce to sustain the government's "migratory bird" rule, 131 U.S., at 166, the D.C. Circuit in *Rancho Viejo*, following the Fourth Circuit's decision in *Gibbs* lent its support to (or at least did not foreclose) such contentions. *Rancho Viejo*, 323 F.3d, at 1067 n. 2 (citing *Gibbs*, 214 F.3d at 493-95).

Six circuit judges in the case below have likewise acknowledged the extent of the disagreement between the two circuits. On Friday, February 27, 2004—the very day that this Court considered but denied the petition for writ of certiorari in *Rancho Viejo*—the Fifth Circuit released its decision in this case denying the petition for rehearing *en banc* that had been pending for nearly a year, confirming rather than ameliorating the split in rationales that has developed among the Circuit Courts. Particularly significant is the lengthy opinion by Circuit Judge Edith Jones—joined

by Circuit Judges Grady Jolly, Jerry Smith, Harold DeMoss, Edith Brown Clement, and Charles Pickering—dissenting from the denial of the petition for rehearing *en banc*.

In her opinion, Judge Jones and five other judges explicitly referenced the circuit split that has developed between the reasoning of the Fifth Circuit in this case and the D.C. Circuit in *Rancho Viejo*.

Judge Jones stated that in the *GDF Realty* panel decision, the Fifth Circuit "panel correctly determined, *unlike other courts,* that the 'regulated activity' under the ESA is Cave Species *takes*, not the appellants' planned commercial development of the land." *GDF Realty*, 362 F.3d, at 288 (first emphasis added). The reference to "other courts" that had reached the opposite conclusion is expressly to the *Rancho Viejo* case, which found, as noted by Judge Jones, "that the regulated activity was not the ESA take but rather the 'construction of a commercial housing development.'" *Id.*, at 288-89 (citing *Rancho Viejo*).

Judge Jones' opinion explains that the Fifth Circuit panel's constitutionally-mandated analysis—that the Commerce Clause analysis must center on the actual Cave Species take rather than the peripheral planned commercial development—is at odds with the Fifth Circuit's conclusion. The result (which would likewise occur if the D.C. Circuit's constitutionally-impermissible and conflicting analysis were employed) is "constitutionally limitless" and "a remote, speculative, attenuated, indeed more than improbable connection to interstate commerce." *Id.*, at 287.

Taken together, a majority of the active judges on the Fifth Circuit—the 3 panel judges, plus the six judges joining Judge Jones' opinion dissenting from the denial of the en banc rehearing petition—has adopted reasoning of fundamental constitutional significance which is in direct conflict with the D.C. Circuit's decision in *Rancho Viejo*, and has expressly acknowledged the split between the

circuits with respect to this critical reasoning.

These conflicts in rationale provide the Court with a needed opportunity to clarify the Commerce Clause analysis set forth in *Lopez* and *Morrison*, and thus warrant certiorari.

CONCLUSION

Certiorari is necessary here to address fundamental elements of this Court's post-*Lopez* Commerce Clause analysis, in the specific context of whether Congress has the authority to regulate wholly intrastate, non-commercial species, and the local activities that impact their habitats. Accordingly, this Court should grant the petition for a writ of certiorari. And if certiorari is granted in this case, this Court should revisit its recent denial of certiorari in the *Rancho Viejo* case, so that the *Rancho Viejo* case can be heard—or at least held, *see Forgett v. United States*, 390 U.S. 203 (1968); *United States* v. *Ohio Power Co.*, 351 U.S. 980 (1956)—and resolved simultaneously with the *GDF Realty* case now under consideration.

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In The

Supreme Court of the United States

GDF REALTY INVESTMENTS, LTD.;
PARKE PROPERTIES I, L.P.; AND
PARKE PROPERTIES II, L.P.,

Petitioners,

v.

GALE A. NORTON, Secretary of the Interior, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the United States Fish and Wildlife Service violated the Commerce Clause by regulating "takes" of intrastate, non-economic species under the Endangered Species Act.

2. Whether aggregation of all takes of all endangered species may sustain the regulation of intrastate, non-economic species whose takes, considered alone, do not substantially affect interstate commerce.

LIST OF PARTIES

Petitioners:	GDF Realty Investments, Ltd.; Parke Properties I, L.P.; and Parke Properties II, L.P., are Texas limited partnerships that have never issued shares to the public. They do not have a parent corporation, nor is there any publicly held company that owns 10 percent or more of its stock.
Respondents:	Gale A. Norton, Secretary, United States Department of the Interior; and Steven A. Williams, Director, United States Fish and Wildlife Service.
Amicus Curiae:	Mountain States Legal Foundation.

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

Mountain States Legal Foundation ("MSLF") respectfully submits this *amicus curiae* brief in support of Petitioners, GDF Realty Investments, Ltd.; Parke Properties I, L.P.; and Parke Properties II, L.P. (collectively, "GDF"). Pursuant to Supreme Court Rule 37(2)(a), this *amicus curiae* brief is filed with the written consent of all the parties.[1]

IDENTITY AND INTEREST OF *AMICUS CURIAE*

MSLF is a non-profit, membership public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited and ethical government, and the free enterprise system. MSLF's members include businesses and individuals who live and work in nearly every state of the country. A large number of MSLF's members work in businesses involved in the utilization and development of natural resources and, as a result, are involved actively in many environmental issues. Moreover, MSLF and its members have an interest in ensuring that federal laws and regulations, including the Endangered Species Act, are implemented

[1] Copies of the consent letters have been filed with the Clerk of the Court. In compliance with Supreme Court Rule 37(6), MSLF represents that no counsel for any party authored this brief in whole or in part and that no person or entity, other than MSLF, made a monetary contribution to the preparation or submission of this brief.

and enforced in a manner consistent with the Constitution of the United States.

SUMMARY OF ARGUMENT

The Commerce Clause gives Congress the authority to "regulate Commerce with foreign Nations, and among the several States. . . ." U.S. Const. art. I, § 8, cl. 3. The scope of congressional authority under the Commerce Clause continues to be the subject of heated debate and litigation within the courts. In particular, the Endangered Species Act of 1973 ("ESA"), 16 U.S.C. § 1531, *et seq.*, raises concerns regarding whether various intrastate activities sufficiently affect interstate commerce to permit Congress to regulate them. Thus, in determining whether the Commerce Clause authorizes regulation of various endangered or threatened species under the ESA, a determinative issue is whether those species, and the possible "take" of an individual specimen of those species, individually affect interstate commerce.

Misconstruing this determinative issue and acting contrary to the precedents of this Court, the Fifth Circuit Court of Appeals upheld the federal government's regulation of an activity that neither affects interstate commerce nor constitutes commerce under the Commerce Clause. Pet. App. 1-74. The Fifth Circuit allowed the U.S. Fish and Wildlife Service ("FWS") to exceed the scope of the Commerce Clause by extending Section 9(a)(1)(B) of the ESA, 16 U.S.C. § 1538(a)(1)(B), to wholly intrastate, non-commercial species – specifically, several almost microscopic, eyeless insects, that live their entire lives underground in caves and have never been bought, sold, or traded in commerce

in any form or fashion.[2] The result is confusion and disarray regarding the scope of the federal government's Commerce Clause authority to regulate takes of intrastate, non-commercial species under the ESA. This confusion has led to unfettered, and seemingly unlimited, federal regulatory power over species and, consequently, over property rights of private landowners. This result warrants *certiorari* to limit congressional authority to regulate species solely to the extent permitted by the Commerce Clause.

ARGUMENT IN SUPPORT OF PETITION

I. THE RIGHTS OF PRIVATE LANDOWNERS AND STATES MAY NOT BE ENCROACHED UPON BY REGULATING TAKES OF INTRASTATE, NON-COMMERCIAL SPECIES UNDER AUTHORITY OF THE COMMERCE CLAUSE.

The Fifth Circuit's holding that Congress has the authority, under the Commerce Clause of the Constitution, to authorize, through the ESA, the regulation of private lands to protect wholly intrastate and commercially irrelevant cave bugs has stretched the Commerce Clause to the point of providing federal agencies unlimited power to regulate all state and local land use activity. Pet. App.

[2] The FWS has listed a total of six species of insects that live in caves and sinkholes on the petitioners' property as "endangered" under § 4 of the ESA, 16 U.S.C. § 1533(a)(1). These "endangered" cave insects are: (1) Bee Creek Cave Harvestman; (2) Tooth Cave Pseudoscorpion; (3) Tooth Cave Spider; (4) Tooth Cave Ground Beetle; and (5) Kretschmarr Cave Mold Beetle. The final rule listing these five cave insects as "endangered" was adopted on September 16, 1988. 53 Fed. Reg. 36029. The FWS subsequently listed a sixth species, the Bone Cave Harvestman, as "endangered" on August 18, 1993. 58 Fed. Reg. 43818.

36. The most significant impact of such unlimited authority will not be upon any purported "threatened" or "endangered" species, but upon private landowners who will be forced to surrender their property rights, including the value of their property, in response to direct federal regulation of wholly intrastate, non-commercial species.

The Fifth Circuit's holding disregards totally this Court's Commerce Clause jurisprudence and will, if allowed to stand, permit the ESA and its "take" provisions to regulate private property in every State of the Nation with no constitutional limit.[3] The reach of this unbridled authority is indeed significant because "[a]pproximately [half of the] species in the United States currently designated as threatened or endangered [under the ESA] are found in only one state." *National Association of Home Builders v. Babbitt*, 130 F.3d 1041, 1052 (D.C. Cir. 1997).[4] Furthermore, according to one report, "[m]ore than half of the species in the United States that are protected by the [ESA] have at least eighty-one percent of their habitat on non-federal land. Between a third and a half do not occur at all on federal land." R. Thornton, *Habitat Conservation*

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[3] Section 9(a)(1)(B) of the ESA makes it unlawful to "take" any species listed as endangered or threatened without a permit. 16 U.S.C. § 1538(a)(1)(B). The ESA defines "take" to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* at § 1532(19). Moreover, "harm" has been defined to include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding." 50 C.F.R. § 17.3; *see also, Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 708 (1995).

[4] Currently, 1,265 "threatened" or "endangered" animal and plant species are listed under the ESA in the United States. 50 C.F.R. § 17.11 (2004).

Planning In The Babbitt Interior Department – Environmental Salvation or Landowner Giveaway, 1 Rocky Mtn. Min. L. Fdn. 1, 9 (1997).[5]

Thus, it is clear that the ESA, including the broad authority that federal agencies accord themselves from their ESA regulations, necessarily affects the rights of private property owners. Allowing federal regulatory power under the ESA to extend to wholly intrastate, non-commercial activity forces an individual, who attempts to engage in an otherwise legal activity and to manage his property to ensure his livelihood and economic needs, to bear a disproportionate cost of protecting species in an unconstitutional manner. Moreover, this cost often includes criminal sanctions.

In 1993, Fred Purcell became acutely aware of the potential cost he could be forced to bear simply because he was a private landowner. Pet. App. 4. Attempting to maintain his property, Mr. Purcell began removing brush and trash; an activity that in no way affects interstate commerce. *Id.* Yet, because of the FWS's broad authority to regulate wholly intrastate, non-commercial species, Mr. Purcell was advised that he was under federal criminal investigation and was threatened with criminal penalties for the possible "take" of endangered species – cave bugs. *Id.* Threats by the FWS are not idle and the criminal penalties imposed for a purported "take" of a threatened or endangered species are not insubstantial. The ESA provides for civil penalties of up to $25,000.00 per occurrence, along with criminal penalties of up to $100,000.00 and a year in jail, for activities that "take" an "endangered"

[5] Non-federal land refers to privately-owned and state-owned land.

species. 16 U.S.C. § 1540(a)(1)-(b)(1). For activity affecting a "threatened" species, the ESA provides for civil penalties of up to $12,000.00 per occurrence and criminal penalties of up to $25,000.00 and six months in jail. *Id.* Although Mr. Purcell was never prosecuted, the threats of the FWS alone were enough to restrict his right simply to maintain his private property.

Unfortunately, Lin Drake of Cedar City, Utah, encountered more than mere threats when he attempted to farm his private land. In 1995, Mr. Drake contacted the FWS regarding the possibility of the existence of Utah prairie dogs on his property, a wholly intrastate species listed as "threatened" under the ESA. The FWS advised Mr. Drake that he could proceed with farming operations, at which time he began normal agricultural activities. Subsequent to this action, however, the FWS sent notice to Mr. Drake that he was being charged for violating the "take" provision of the ESA and was assessed a civil penalty of $15,000.00 for the purported taking of numerous Utah prairie dogs. This penalty was levied against Mr. Drake despite that the FWS could not prove that a "take" had occurred; that is, that Utah prairie dogs had been injured or killed. *See, Sweet Home*, 515 U.S. at 708 (defining "harm" as where modification or degradation of habitat actually kills or injures wildlife). All of this occurred regarding a wholly intrastate species that does not substantially affect interstate commerce under the ESA.

Due to the broadening scope of Commerce Clause authority to regulate "takes" of intrastate, non-commercial species, private landowners, like Mr. Purcell and Mr. Drake, are forced to bear substantial costs and significant risks in attempting to exercise their rights as owners of private property. However, this broadening of authority

under the ESA does not just limit the rights of landowners; it encroaches upon the very rights of the states themselves to regulate lands within their borders.

Land-use planning, regulation, and zoning are not enumerated powers granted to the federal government. Authority over these activities, including the activities of GDF, are reserved to the States under the Tenth Amendment. They are the basic, fundamental functions of local governmental entities. Justice Marshall recognized the right of the States to regulate private lands within their borders in *Village of Belle Terre v. Boras*, 416 U.S. 1, 13 (1974):

> I am in full agreement with the majority that zoning is a complex and important function of the State. It may indeed be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life.

In *United States v. Lopez*, this Court suggested that, whenever Congress attempts to regulate areas traditionally regulated by state or local governments, including the rights of private property owners, this Court will review that legislation with caution. 514 U.S. 549, 557-68 (1995). Foretelling the scrutiny it would apply, this Court rejected, in *Lopez*, the "costs of crime" and "national productivity" justifications for the Gun-Free School Zones Act ("GFSZA") proffered by Congress both because, had it accepted those justifications, it would be "difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign," *Id.* at 564, and because such a broad

reading of the Commerce Clause would undermine the federal system of government. *Id.* at 561, n.3, 564, 567-68.

Likewise, in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"), congressional authority under the Commerce Clause was tested. In *SWANCC*, this Court addressed whether the Environmental Protection Agency and the Army Corps of Engineers ("the Corps") could regulate isolated intrastate waters and wetlands that are not connected or adjacent to navigable waters "based on their actual or potential use as habitat for migratory birds." *SWANCC*, 531 U.S. at 163-64. This Court held that the migratory bird regulation was invalid because Congress did not intend to include "isolated" wetlands or waters within the term "navigable waters" when it enacted the Clean Water Act ("CWA"). *Id.* at 162-63.

Although the *SWANCC* decision did not decide whether federal regulation of isolated intrastate wetlands exceeded congressional authority under the Commerce Clause, this Court did suggest that the Corps' interpretation may have exceeded that authority. *Id.* at 172-73. This Court indicated that the Corps' regulation of isolated intrastate wetlands would raise serious questions under the Commerce Clause because local land use regulation is a traditional state and local function. *Id.* at 172-74. Even though previous rulings had found that migratory bird protection was a "national interest of very nearly the first magnitude," this Court determined it was "not clear" whether the regulated activity or object, in the aggregate, affects interstate commerce. *Id.* at 173 (quoting *Missouri v. Holland*, 252 U.S. 416, 435 (1920)). Because there was no clear statement in the CWA that Congress intended to give the federal government authority over isolated wetlands,

this Court refused to interpret the regulation to include "federal jurisdiction over ponds and mudflats falling with the 'Migratory Bird Rule' [that] would result in a significant impingement of the States' traditional and primary power over land and water use." *Id.* at 174.

Because local land use and private property rights are necessarily intertwined, this Court's holdings in *Lopez* and *SWANCC* control in this matter. The application of the ESA's "take" provisions to the cave bugs substantially intrudes on the rights of GDF, as private landowners, and on the sovereign power of the state to control local land. *See, FERC v. Mississippi*, 456 U.S. 742, 768 n.30 (1982) (the regulation of land use is the most prominent activity of any State). Justice Kennedy, concurring in the *Lopez* decision, argued that courts should be hesitant to allow Congress to use the Commerce Clause as its basis for federal regulation in an "area of traditional state concern" that "States lay claim [to] by right of history and expertise." *Lopez*, 514 U.S. at 580, 583 (Kennedy, J., concurring). Justice Kennedy elaborated that, with such an expansive definition of the Commerce Clause, "the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory." *Id.* at 577.

Thus, the Fifth Circuit's ruling upholding the authority of the FWS to apply the "take" provision of the ESA to GDF regarding wholly intrastate, non-commercial species intrudes unconstitutionally on the rights of private landowners to use their land and the responsibilities of States to regulate local land use. Accordingly, *certiorari* is warranted to ensure that private property rights and State authority do not themselves become threatened or endangered.

II. THE AGGREGATION OF NON-ECONOMIC ACTIVITY BROADENS THE SCOPE OF CONGRESSIONAL AUTHORITY UNDER THE COMMERCE CLAUSE WITH NO LOGICAL STOPPING POINT.

The description that six judges of the Fifth Circuit, in dissenting from the denial of rehearing *en banc*, accorded the decision of the circuit panel in this case was: *reductio ad absurdum*. Pet. App. 76. Indeed; the absurd consequence of the Fifth Circuit's decision broadened the scope of congressional authority under the Commerce Clause with no logical stopping point. The Fifth Circuit did so by ignoring the limits imposed by the Commerce Clause and by aggregating the effects of all species listed as "endangered" or "threatened" under the ESA on the ground that regulation of the cave bugs, which have no commercial value, intrastate or interstate, is an essential part of the ESA's regulation of economic activity. Pet. App. 32-33. The dissent called this "interdependent web" connection a "remote, speculative, attenuated, indeed more than improbable connection to interstate commerce." Pet. App. 76.

This Court's precedent determining whether the principle of aggregation should be applied is clear: the aggregation principle, as developed in *Wickard v. Filburn*, 317 U.S. 111 (1942), should be employed only to support a finding that the cumulative effect of the activities in a case actually have a commercial impact. *See, Lopez*, 514 U.S. at 558; *United States v. Morrison*, 529 U.S. 598, 611, n.4 (2000). The Fifth Circuit panel maintained that it recognized and adhered to this aggregation principle. Pet. App. 13, 32-36. They did not.

In its analysis, the Fifth Circuit panel conceded that "takes" of the cave insects are neither economic nor commercial and that such intrastate activity has a "*de minimis* effect on interstate commerce." Pet. App. 31. Moreover, the panel expressly noted that: there is no market for cave insects; any future market is conjecture; future medical benefits from the cave insects are far too speculative; there is no historic trade in the cave insects; and tourists do not travel to Texas to view them. *Id.* The panel even rejected the government's argument that "takes" of the cave insects are commercial in character once aggregated with other endangered species, noting that "[t]o accept such a justification would render meaningless any 'economic nature' prerequisite to aggregation." Pet. App. 31-32.

The Fifth Circuit panel did not find, however, as this Court's precedent requires, that the challenged activity, the "take" of cave bugs that are exclusively intrastate, is not commercial and therefore not subject to scrutiny under *Wickard*'s aggregation principle. Instead, the Fifth Circuit panel stretched the bounds of reason to rationalize its application of the aggregation principle to this case. The panel surmised that the regulation of the cave insects, a non-commercial, intrastate species, is "part of a larger regulation of activity" that is "essential" to the ESA as an economic regulatory scheme. Pet. App. 32. Yet, as an "economic regulatory scheme," the ESA logically would apply only to the preservation and conservation of those species that are economic or commercial in nature – something that the Fifth Circuit has determined that the cave bugs are not. Pet. App. 29-31. This illustrates the fallacy of the Fifth Circuit's reasoning, reasoning that contradicts completely this Court's precedent on which the panel purportedly relied. As this Court recognized in *Lopez*

and *Morrison*, the problem with the Fifth Circuit's characterization of the ESA as an economic regulatory scheme is the lack of a stopping point short of complete federalization.

In *Morrison*, this Court held that the Violence Against Women Act ("VAWA"), a federal statute penalizing intrastate gender-based violence, intruded on traditional state authority over criminal matters and thus exceeded the scope of the Commerce Clause. This Court found that the VAWA, like the GFSZA in *Lopez*, was beyond the scope of the Commerce Clause because the activity regulated was essentially non-economic and related to interstate commerce only indirectly. *Morrison*, 529 U.S. at 613-19. Utilizing the scrutiny adopted in *Lopez*, this Court in *Morrison* emphasized that "in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor." *Id.* at 611. Furthermore, this Court "reject[ed] the argument that Congress may regulate non-economic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." *Id.* at 617. The reason was simple: allowing aggregation of non-economic activities to serve as a basis for regulation under the Commerce Clause would allow the federal government to regulate any and every activity with no logical stopping point. *Id.* at 615-17.

Moreover, permitting Congress, under the Commerce Clause, to justify legislation by aggregating non-economic activities would "completely obliterate the Constitution's distinction between national and local authority." *Id.* at 615. For example, the aggregation of non-economic activities could be applied just as easily "to family law and other areas of traditional state regulation since the aggregate

effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant." *Id.* at 615-16. *Morrison* found that the VAWA impermissibly intruded on traditional state authority over family law and criminal issues. As in *Lopez*, this Court emphasized in *Morrison* that courts should carefully evaluate federal legislation that relies on the Commerce Clause for its authority because "[t]he Constitution requires a distinction between what is truly national and what is truly local." *Id.* at 599.

The Fifth Circuit, which adopted the rationale of this Court in *Lopez* and *Morrison*, specifically recognized that Commerce Clause precedent of this Court "stand[s] against" the notion that "[n]on-economic and non-commercial activity could be aggregated" to determine a substantial effect on interstate commerce. Pet. App. 31-32. Nevertheless, the Fifth Circuit upheld the FWS's authority in this case. The Fifth Circuit's opinion, in characterizing the ESA as an economic regulatory scheme, permits the federal government infinite authority, under the Commerce Clause, to regulate any activity. There is no logical stopping point to federal legislation under the Fifth Circuit's opinion; any statute could satisfy the constitutional limitations of the Commerce Clause. No wonder the dissent declared that the panel's opinion lends "new meaning to the term *reduction ad absurdum*." Pet. App. 76.

Accordingly, *certiorari* is warranted in this case to resolve the conflict between this Court and the Fifth Circuit's decision regarding whether aggregation of all takes of all endangered species may sustain the regulation of intrastate, non-economic species whose takes, considered alone, do not substantially affect interstate commerce.

CONCLUSION

For the foregoing reasons, Mountain States Legal Foundation respectfully requests that this Court grant GDF's Petition for *Writ of Certiorari*.

Respectfully submitted,

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Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF THE PETITIONERS

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INTEREST OF AMICUS CURIAE

The National Association of Home Builders ("NAHB") has received the parties' written consent to file this brief as Amicus Curiae in support of Petitioner. Letters of consent have been filed with the Clerk of the Court.[1]

NAHB represents over 215,000 builder and associate members throughout the United States. Its members include not only individuals and firms that construct and supply single-family homes, but also apartment, condominium, multi-family, commercial and industrial builders, land developers and remodelers. NAHB is the voice of the American shelter industry. Through the regular course of operating their businesses, NAHB's members are subject to regulations under the Endangered Species Act ("ESA"). Therefore, NAHB is knowledgeable of the ramifications of inequitable regulatory actions and time-consuming processes that are often involved with land development.

Furthermore, NAHB has cultivated expertise in the constitutional and statutory issues in this matter, particularly in light of its status as the lead plaintiff in *National Ass'n of Home Builders, et al. v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 937 (1998). The matter concerned the constitutionality of regulating land development due to a fly that only lives in California.

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[1] Pursuant to Rule 37.6 of this Court, Amicus Curiae states that its counsel authored this brief and amicus paid for it. The brief was not written in whole or part by counsel for a party, and no one other than amicus made monetary contribution to its preparation.

Finally, NAHB has been before the Court as *amicus curiae* or "of counsel" to the landowner in a significant number of land regulation cases. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987);[2] *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Communities for a Great O--.*, 515 U.S. 687 (1995); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 124 S. Ct. 1537 (2004).

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[2] The Court's opinion cited NAHB's brief. 483 U.S. at 840.

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INTRODUCTION

Under the Endangered Species Act ("ESA"), it is unlawful to "take" an endangered species without a permit. To "take" a species is to harass, harm, hunt or kill it. *See* 16 U.S.C. § 1532. The Fish and Wildlife Service ("FWS") may issue permits to "take" endangered species incidental to conducting an otherwise legal activity. 16 U.S.C. § 1539. In the case below, the FWS denied the Petitioners a permit to "take" a certain number of insects (karst invertebrates) as an incident to developing their property. In the courts below, the Petitioners argued that the application of the "take" prohibition to the intrastate, non-economic karst invertebrates violates the Commerce Clause.

The Court of Appeals for the Fifth Circuit, affirming the District Court opinion, held that the FWS's application of the "take" prohibition in this case did not violate the Commerce Clause. In an opinion that ignored the Petitioners' as applied challenge, the Fifth Circuit explained that the "taking" of karst invertebrates would not have a substantial relationship to interstate commerce. Yet, it held that because the taking of all endangered species would have an impact on interstate commerce, the FWS did not violate the Commerce Clause by applying the ESA's "take" provision to the karst invertebrates.

By upholding FWS's interpretation and addressing the question of whether that interpretation was constitutional, the Fifth Circuit opinion conflicts with two rules of statutory construction as established by this Court. In addition, in conducting its Commerce Clause analysis, the Fifth Circuit expanded its review beyond the facts of this case. This analysis differs from the analyses conducted by other Circuit Courts and illustrates how the lower courts are inconsistently examining statutes that do not contain a

"jurisdictional element." Certiorari is warranted in this matter to address these issues.

ARGUMENT

I. THE FIFTH CIRCUIT'S ANALYSIS VIOLATED TWO RULES OF STATUTORY CONSTRUCTION EMPLOYED BY THIS COURT.

Congress enacted the Endangered Species Act ("ESA") to "provide a program for the conservation of [ ] endangered species." 16 U.S.C. §1531(b). One means of conservation is the prohibition against "taking" species that the Secretary of the Interior, through the Fish and Wildlife Service ("FWS"),[3] has declared "endangered." *See* 16 U.S.C. §§ 1533, 1538. In the case below, the Fifth Circuit addressed whether the FWS's application of the "take" prohibition to the Petitioners ("GDF Realty") request to modify "karst invertebrate" habitat violated the Commerce Clause. The Court of Appeals upheld FWS's interpretation of the ESA without any clear indication that Congress meant to reach wholly intrastate, non-commercial species. *GDF Realty Investments, LTD v. Norton,* 326 F.3d 622 (5th Cir. 2003), *reh'g and reh'g en banc denied,* 362 F.3d 286 (5th Cir. 2004), *petition for cert. filed,* No. 03-1619 (U.S. May 27, 2004). The Fifth Circuit's analysis violated two tenets of statutory construction.

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[3] For certain fish species the Secretary of Commerce, through the NOAA Fisheries, determines whether the species is "endangered."

A. The Fifth Circuit Failed to Abide by The Clear Statement Rule Thereby Reaching a Constitutional Issue it Should Have Avoided.

The "most important" rule of statutory construction "is the clear statement rule." *See* Laurence Tribe, *American Constitutional Law* Vol. I, § 5-9 at 853 (3d ed. 2000). By addressing the constitutionality of the ESA take prohibition, the Fifth Circuit ignored the clear statement rule and contravened the precedent of this Court.

1. If an Agency Determination Invokes The Outer Limits of Congress's Power, Courts Must Find a Clear Indication From Congress Before Addressing Constitutional Questions

In *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988), this Court addressed the tension between a statutory interpretation of the National Labor Relations Board ("NLRB") that proscribed a union from handing out leaflets (handbilling) and the First Amendment's protection of free speech. In analyzing the NLRB interpretation, the Court explained, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Id.* at 575. Thus, because the NLRB's construction "pose[d] serious questions . . . under the First Amendment" without a clear indication from Congress that the statute should proscribe peaceful handbilling, the Court struck down NLRB's interpretation. *Id.* at 576.

Similarly, in *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) (hereinafter "*SWANCC*"), the Court addressed the tension

between a statutory interpretation[4] of the Army Corps of Engineers, allowing it to regulate isolated ponds due to the presence of migratory birds, and Congress's authority to regulate interstate commerce. Citing *Edward J. DeBartolo*, the Court clarified that when "an administrative interpretation of a statute invokes the outer limits of Congress' power, [it expects] a clear indication that Congress intended that result." *Id.* at 172. In applying this rule, the Court focused on two issues raised by the Corps's interpretation. First, by regulating isolated ponds, the Corps's construction "result[ed] in a significant impingement of the States' traditional and primary power over land use and water." *Id.* at 173. Second, for the Court to resolve whether the Corps's interpretation was lawful under the Commerce Clause, it would have had to decide whether the activity that the Corps was regulating was the filling of the ponds, or the Petitioner's construction and operation of a municipal landfill. *Id.* The *SWANCC* Court explained that these issues raised "significant constitutional questions." *Id.* at 174. Therefore, since there was not a clear statement from Congress that it meant for the statute to reach the isolated ponds, the Court avoided the constitutional issues and did not accept the Corps's interpretation. *Id.*

Similar to the Corps's interpretation of the CWA in *SWANCC*, here FWS's application of the take prohibition to the Petitioners "invoke[d] the outer limits of Congress' power" in at least three different ways. *Id.* at 172. Therefore, in accordance with the clear statement rule, before reaching the constitutionality of the FWS's application of the ESA under the Commerce Clause, the

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[4] In *SWANCC*, the Corps had construed the Clean Water Act ("CWA") to allow itself to regulate isolated ponds and lakes. *SWANCC*, 531 U.S. at 168.

Fifth Circuit needed to search for and find a clear indication from Congress that it meant for the ESA to protect intrastate, non-commercial species. It failed to do either.

2. The Fifth Circuit Should Have Avoided Deciding That "Taking" an Endangered Species is The Precise "Regulated Activity" at Issue.

In the case below, the Fifth Circuit faced the exact same question this Court faced in *SWANCC*. It was asked to address whether an agency's (FWS) interpretation of a statute (ESA) violated the Commerce Clause. This required the court to either decide what activity was being regulated (GDF's planned development or the taking of karst invertebrates), or interpret the statute in a reasonable fashion as to avoid the constitutional question. The Fifth Circuit, disagreeing with the District Court's characterization of the regulated activity, wrestled with the constitutional question and (correctly) determined that the regulated activity was the taking of karst invertebrates.

However, as this Court explained in *SWANCC*, simply deciding what activity is actually being regulated raises a "significant constitutional question[]." *SWANCC*, 531 U.S. at 174. The Fifth Circuit violated the clear statement rule by addressing the FWS's application of the ESA without first finding a clear indication that Congress intended for the "take" prohibition to attach to an intrastate, non-commercial species, such as karst invertebrates.

3. The Fifth Circuit Should Have Avoided Deciding the Constitutional Issue Because FWS's Interpretation Raises Serious Federalism Concerns

The FWS's denial of the Petitioners' request to modify karst invertebrate habitat raises serious federalism concerns that the Fifth Circuit failed to address. Pursuant to the ESA, it is unlawful to "take" an endangered species, which "means to harass, *harm*, pursue, hunt, shoot wound, kill ...." 16 U.S.C. §§ 1532, 1538 (emphasis added). Furthermore, the FWS has defined "harm" to mean an act that injures wildlife, including "significant habitat modification or degradation ...." 50 C.F.R. § 17.3. The Petitioners wished to commercially develop their property. This would have required them to modify land inhabited by karst invertebrates. By regulating the Petitioners' land modification, the FWS clearly regulated land use. Such regulation impinged upon a "traditional and primary power" of the States. *SWANCC*, 531 U.S. at 174. Thus, FWS's construction of the ESA "readjust[s] the federal-state balance" thereby raising serious federalism questions. *SWANCC*, 531 U.S. at 174. In light of such concerns, before addressing the constitutionality of FWS's interpretation, the clear statement rule required the Fifth Circuit to find a clear indication from Congress that it meant for the take prohibition to apply to wholly intrastate, non-economic species.

4. The Fifth Circuit Should Have Avoided The "Far Reaching" Aggregation Theory of Commerce Clause Jurisdiction.

Finally, since the Fifth Circuit had to resort to "far reaching" Congressional authority to hold that the FWS's interpretation did not violate the Commerce Clause, it

should have looked for a statement that Congress meant to protect intrastate, non-economic species. In the case below, the court explained that to be lawful under the Commerce Clause, FWS's regulation of the Petitioners' "takes" must substantially affect interstate commerce. *GDF Realty*, 326 F.3d at 635. It began its analysis by determining that the ESA is an "economic regulation." *Id.* at 639-40. Then, according to the Fifth Circuit, it was proper to aggregate the taking of karst invertebrates with the taking of **all** other endangered species and determine whether this aggregate had a substantial effect on interstate commerce (the aggregation principle). *Id.* at 640. The Petitioners had conceded that this aggregate would have a substantial impact on interstate commerce. *Id.* at 639. Thus, the Fifth Circuit held that the FWS's application of the take prohibition to the Petitioners did not exceed Congress' authority under the Commerce Clause. *Id.* at 641.

Wickard v. Filburn, 317 U.S. 111 (1942), is recognized as the father of the aggregation principle. *See* Jim Chen, *Filburn's Legacy,* 52 Emory L.J. 1719, 1743 (2003) (The "crucial observation about the consumption of homegrown wheat enabled the Court to make the 'aggregation' argument for which *Wickard v. Filburn* is best known today ..."). In *Wickard,* the government charged the owner of a small farm with a penalty for growing wheat in excess of the allotments allowed under the Agricultural Adjustment Act of 1938, as amended. The owner countered that a portion of the wheat he grew was for consumption on his farm (*i.e.,* poultry feed, making flour, seeding) and therefore the Federal government could not regulate it pursuant to its authority over interstate commerce. The parties "stipulated a summary of the economics of the wheat industry" and the Court explained, "[c]ommerce among the states in wheat is large and important." 317 U.S.

at 125. Thus, even though the owner's growing of wheat for personal consumption had a trivial effect on interstate commerce, "his contribution, taken together with that of many others similarly situated, [was] far from trivial."[5] *Id.* at 128.

In *United States v. Lopez*, this Court recognized *Wickard* as a case involving the regulation of economic activity. Moreover, it explained that *Wickard* "is perhaps the most far reaching example of Commerce Clause authority over intrastate activity." *Lopez*, 514 U.S. at 560. If, considering the importance of the wheat market, Congress's regulation of growing wheat for personal use is "far reaching," then its regulation of harm to an intrastate species for which there is no market reaches even further. By relying on the aggregation principle, the court below skirted the Constitution's outer bounds. Thus, before resolving whether the FWS's application of the ESA violated the Commerce Clause, the court should have searched for a clear statement that the ESA's take prohibition covers intrastate, non-economic species.

Hence, the FWS's interpretation of the ESA

- forced the Fifth Circuit to decide what activity the ESA regulates;
- raised serious federalism concerns; and
- required the court to use a "far reaching" principle to hold that the interpretation was constitutional.

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[5] The *Wickard* Court explained that "[c]onsumption on the farm where grown appears to vary in an amount greater than 20 per cent of average production." *Wickard* 317 U.S. at 127.

Therefore, the FWS's interpretation invoked the "outer limits of Congress' power." *SWANCC*, 531 U.S. at 172. Consequently, the clear statement rule required the Fifth Circuit to search for and find a clear indication from Congress that the ESA's take prohibition attaches to wholly intrastate, non-economic species. It failed to do so. Moreover, had it looked, it would have come up empty handed.

B. The Fifth Circuit Should Not Have Upheld The FWS's Interpretation in Light of The ESA's Civil And Criminal Penalties.

A species that is solely intrastate, and that has no market or commercial value beyond mere "conjecture,"[6] is not one for which Petitioners should be subject to the ESA's civil and criminal sanctions for taking species. Because violations can result in serious civil and criminal penalties,[7] and Congress was not clear as to whether the ESA attaches to wholly intrastate, non-economic species, the Fifth Circuit should have construed the "take" provision in favor of the Petitioners.

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[6] *GDF Realty Investments, LTD v. Norton,* 326 F.3d 622, 638 (5th Cir. 2003) (stating "The *possibility* of future substantial effects of the Cave Species on interstate commerce, through industries such as medicine, is simply too hypothetical and attenuated from the regulation in question to pass constitutional muster .... Cave Species takes are neither economic nor commercial. There is no market for them; any future market is conjecture.") (emphasis in original) (citing *United States v. Morrison,* 529 U.S. 598, 612 (2000)).

[7] The ESA provides civil penalties of up to $25,000 for each knowing violation of the "take" provision. Criminal penalties include fines up to $50,000 for knowing violations and imprisonment for up to one year. *See* 16 U.S.C. § 1540(a)(1) (civil penalties); 16 U.S.C. § 1540(b)(1) (criminal violations).

The statutory definition of "take" does not answer the question whether that term necessarily includes species that are solely intrastate and without any identifiable market or commercial value. Indeed, the statute does not say that solely intrastate species are subject to regulation. 16 U.S.C. § 1531, *et seq.*; 16 U.S.C. § 1532(19) (*see supra,* discussing definition of "take"). The regulations are similarly silent. *See, e.g.,* 50 C.F.R. § 17.3 ("harm" defined).

Moreover, the legislative history does not answer the question of whether FWS can regulate an *intrastate* species that has no market or no commercial value. *See GDF Realty,* 326 F.3d at 367. Similarly, the plain meaning of the statute, in context with other sections of the ESA, is also silent on this question. *See, e.g.,* 16 U.S.C. § 1531, *et seq.*

Furthermore, the opinion below is itself contrary to any contention by FWS that it can regulate solely intrastate species. *See generally, GDF Realty,* 326 F.3d 622. Pointedly, while analyzing whether the "take" of the karst invertebrates would substantially affect interstate commerce, the court below stated, "To the extent FWS contends that the loss of the Cave Species would affect the scientific travel or publication industries, it offers no evidence that it would substantially do so. In fact, the minimal evidence presented by FWS indicates such an effect would be negligible." *GDF Realty,* 326 F.3d at 637. Despite its recognition that the "effect would be negligible," the court held the "take" provision, as applied in this case, would substantially affect interstate commerce and accordingly held the statute applicable to Petitioners. *Id.*

Because the statute is imprecise on the question whether Congress intended to regulate *wholly intrastate* species, and

because the statute allows imposition of penalties involving significant fines and imprisonment,[8] a court should construe any ambiguity in the statute in favor of Petitioners. As this Court stated in *United States v. Bass,* "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." 404 U.S. 336, 347 (1971) (setting aside the conviction "because the government has failed to show the requisite nexus with interstate commerce") (internal citation omitted).

Two policies serve as the basis for the rule of lenity. First, it serves to protect a person's right to fair warning: "Application of the rule of lenity ensures that criminal statutes will provide *fair warning* concerning conduct rendered illegal ...." *Liparota v. United States,* 471 U.S. 419, 427 (1985). Second, because of the "seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *Bass,* 404 U.S. at 348 (internal citations omitted). Thus, the rule of lenity is "reserved ... for those situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to 'the language and structure, legislative history, and motivating policies' of the statute." *Moskal v. United States,* 498 U.S. 103, 108 (1990) (internal citations omitted; emphasis in original).

Moreover, this Court has stated, "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative to require that Congress should have spoken in language that is clear and definite." *Bass,* 404

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[8] Indeed, one of the Petitioners was "notified by FWS that he was under federal criminal investigation for possible endangered species takes." *GDF Realty,* 326 F.3d at 626.

U.S. at 347 (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-222 (1952)). Under the circumstances of Petitioners' case, even after examining the language, structure, and legislative history of the statute, uncertainty remains over whether Congress intended to extend the scope of the ESA to regulate wholly intrastate species that have no commercial or market value. *Moskal*, 498 U.S. at 108.

The Court's review is necessary to clarify the scope of FWS's jurisdiction over wholly intrastate species, which the ESA does not address, because severe civil and criminal penalties attach for any violations of the "take" prohibition.

II. Certiorari is Warranted to Clarify The Confusion in The Lower Courts on The Importance of The "Jurisdictional Element"

In *United States v. Lopez*, 514 U.S. 549, 558 (1995), this Court "identified three broad categories of activity that Congress may regulate under its commerce power." One of these categories is "activities that substantially affect interstate commerce." *Id.* at 559. Furthermore, *United States v. Morrison*, 529 U.S. 598 (2000), clarified that a court must consider four factors when determining whether a statute can be upheld as regulating an activity that substantially affects interstate commerce. The second of these factors is whether the legislation in question contains a "jurisdictional element" which might limit the statute's reach to a discrete set of activities that have an explicit connection to interstate commerce. *Id.* at 612. In *Lopez*, the Court described the jurisdictional element as language that would "ensure, through a case-by-case inquiry," that the regulated activity affects interstate commerce. *Lopez*, 514 U.S. at 561.

In both *Lopez* and *Morrison*, the lack of a jurisdictional element weighed in favor of finding that the statue at issue violated the Commerce Clause. *Lopez*, 514 U.S. at 561-62; *Morrison*, 529 U.S. at 611-13. Since *Lopez* and *Morrison* were decided, the lower courts have not consistently weighed the presence, or lack, of a jurisdictional element when determining whether Congress can constitutionally regulate an activity as one that substantially affects interstate commerce. Certiorari is necessary so the Court can clarify the importance of the "jurisdiction element" in deciding whether the application of particular legislation violates the Commerce Clause.

For example, in *United States v. McCoy*, 323 F.3d 1114, 1126 (9th Cir. 2003), the Ninth Circuit analyzed the application of a statute that contained a jurisdictional element that was "useless." McCoy was charged with possessing child pornography made with materials that traveled in interstate commerce in violation of 18 U.S.C. § 2252(a)(4)(B). Section 2252(a)(4)(B) provides that it is unlawful to produce sexually explicit pictures of a minor if the materials used to produce the picture have "been mailed or ... shipped or transported ...." The Ninth Circuit explained that the above quoted jurisdictional element "does not serve to limit application of the statute to a discrete set of cases that have a substantial effect on interstate commerce." *McCoy*, 323 F.3d at 1130. Thus, in light of a "useless" jurisdictional element, the Ninth Circuit looked to see whether there was "any substantial connection between [McCoy's] conduct and *any* interstate commercial activity." *Id.* at 1132. Finding none, the Court held that the statute was unconstitutional as applied.

The Fifth Circuit should have used an analysis similar to the Ninth Circuit's in *McCoy* because the take provision of the ESA does not contain a jurisdictional element. A nonexistent jurisdictional element is obviously less informative than a "useless" one. Thus, applying the Ninth Circuit's reasoning to the GDF case would lead a court to

determine whether GDF's conduct had a "substantial connection [to] any interstate commercial activity." *Id.* The Fifth Circuit held that GDF's conduct did not. *GDF Realty*, 326 F.3d at 636-39. However, it did not end its analysis at that point. Instead, the Fifth Circuit expanded its review beyond the facts of the case to include the "interdependence of [all] species" and examined whether the taking of all endangered species, in the aggregate, would substantially affect interstate commerce. *Id.* at 640.

In a case analogous to *GDF Realty*, the Eighth Circuit reviewed the constitutionality of applying the Americans With Disabilities Act (ADA) to prohibit Missouri from collecting a $2.00 annual fee in exchange for a placard that allowed disabled persons to use reserved parking spaces. *Klinger v. Director, Department of Revenue*, 366 F.3d 614 (8th Cir. 2004). The court reviewed the four *Morrison* factors and found the application of the ADA exceeded Congress's authority under the Commerce Clause. In addressing Congress's failure to include a jurisdictional element in the ADA, the Eighth Circuit explained such absence "might indicate that a statute is overinclusive, unconstitutionally sweeping within its ambit activities that have no explicit connection with or effect on interstate commerce." *Id.* at 618.

The Fifth Circuit, in contrast, placed little weight on the lack of a jurisdictional element in the ESA. Indeed, the Fifth Circuit's analysis seems to suggest that because there is no jurisdictional element to limit the ESA's "take" prohibition, it was free to broaden its review to include the impacts of *all* species on interstate commerce. *See GDF Realty*, 326 F.3d at 640 (agreeing with FWS that "takes of any species threaten the 'interdependent web' of all species."). Such an analysis conflicts with *Klinger*, and this Court's decisions, because under the Fifth Circuit's reasoning the lack of a jurisdictional element apparently makes it more likely that a statute would be found constitutional. Certiorari is therefore warranted to clarify

that when lower courts analyze statutes that do not contain a jurisdictional element, their analysis must ensure that the lack of such an element weighs in favor of the statute being found unconstitutional.

CONCLUSION

The Fifth Circuit failed to follow two fundamental rules of statutory construction that this Court has established. Furthermore, the lower courts are not clear on the importance of the "jurisdiction element" when examining whether an intrastate activity substantially affects interstate commerce. NAHB respectfully requests that the Court grant certiorari to address both of these issues.

August 19, 2004

Respectfully submitted,

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No. 03-1619

In the
Supreme Court of the United States

GDF REALTY INVESTMENTS, LTD.; PARKE PROPERTIES I, L.P.; and PARKE PROPERTIES II, L.P.,

Petitioners,

v.

GALE A. NORTON, Secretary of the Interior, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The questions presented, as to which the courts of appeals are in disarray, which the Fifth Circuit answered inconsistently with *Lopez* and *Morrison*, and which are of immense practical importance, are:

1. Whether the Fish & Wildlife Service violated the Commerce Clause by regulating "takes" of intrastate, noneconomic species under the Endangered Species Act.

2. Whether aggregation of all takes of all endangered species may sustain the regulation of intrastate, noneconomic species whose takes, considered alone, do not substantially affect interstate commerce.

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IDENTITY AND INTERESTS OF AMICUS CURIAE

Under Supreme Court Rule 37.2, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of the Petition for Writ of Certiorari.[1] Written consent was granted by counsel for all parties and lodged with the Clerk of this Court.

Pacific Legal Foundation (PLF) was established over 30 years ago and is the largest and most experienced nonprofit legal foundation of its kind, litigating matters affecting the public interest at all levels of the federal and state courts. PLF is a staunch advocate of limited government and opposes the expansive reading of the commerce power dominant in the courts today.

The Foundation has a long history of amicus participation in this Court and was involved in the landmark Commerce Clause cases on which this case turns: *United States v. Lopez*, 514 U.S. 549 (1995) (*Lopez*), and *United States v. Morrison*, 529 U.S. 598 (2000) (*Morrison*). PLF has also appeared before this Court in a number of Endangered Species Act (ESA) cases, such as *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); *Bennett v. Spear*, 520 U.S. 154 (1997); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003), *cert. denied*. In addition, PLF attorneys brought a Petition for Writ of Certiorari in *Building Industry Association of Superior California v. Norton*, 247 F.3d 1241 (D.C. Cir. 2001), *cert denied*, raising the same constitutional questions this case presents. Among its objectives, PLF seeks to have constitutionally-derived limits imposed on federal regulation of wholly intrastate, noncommercial activity, such as the "taking" of local, cave-dwelling insects in this case.

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[1] Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

INTRODUCTION

Few cases have a greater claim on Supreme Court review than this case. The Fifth Circuit decided the "taking" of minute insects—that live their entire lives underground in a small corner of a single state and have no commercial use—substantially affects interstate commerce. This case is emblematic of the difficulty the lower courts are having in settling on a uniform method of analyzing Commerce Clause enactments, such as the ESA, under this Court's decisions in *Lopez* and *Morrison*.

Unless it was economic in nature, this Court has never upheld a Commerce Clause regulation of an intrastate activity based on that activity's substantial effects on interstate commerce. *See Morrison*, 529 U.S. at 611. But the Fifth Circuit did so in this case by aggregating the effects of "takes" of all threatened and endangered species. That approach to finding "substantial effects" on interstate commerce is at odds with this and other federal courts that have considered the validity of Commerce Clause regulation as applied to intrastate, noncommercial conduct. Review of this case would therefore assist the lower courts in analyzing such cases.

STATEMENT OF THE CASE

For twenty years, Petitioners have tried to develop their 216 acre site west of Austin, Texas. After the landowners spent millions of dollars installing water lines, pump stations, and other infrastructure that were dedicated to the City of Austin, along with a right-of-way adjoining the nearby highway, the City granted development approval in 1984. In 1988, however,

the United States Fish and Wildlife Service listed six species of insects as endangered under the ESA that dwell in subterranean structures on Petitioners' property. These small insects live their entire lives underground in caves and sinkholes. They have been rarely seen and have no commercial use.

After the listing, the Service effectively stopped all development, claiming the development would harm, or "take," the species. Petitioners hired a consultant to survey their property and recommend appropriate protections. As a result, Petitioners dedicated several caves and more than 10 acres of buffer zone to a nonprofit foundation that established a preserve to protect the species. Although this initially satisfied the Service's concerns, Fish and Wildlife has since refused to authorize continued development and has threatened Petitioners with criminal prosecution if they modify their property. For more than 15 years, the Service has refused to grant or deny Petitioners' applications for an "incidental take permit" which would allow them to continue their development. Ultimately, driven to the point of bankruptcy, Petitioners sued the Service to act on their permit applications. The trial court held that the applications were de facto denied and this suit followed, challenging federal jurisdiction over the "taking" of intrastate, noncommercial cave-dwelling insects.

REASONS FOR GRANTING THE PETITION

This Court should grant the Petition for Writ of Certiorari because (1) the circuit courts disagree on how to apply the "substantial effects" test under *Lopez* and *Morrison* and (2) the validity of the ESA as applied to intrastate, noncommercial species, like the cave insects in this case, is an immensely important federal question affecting the lives of every citizen.

1. The Petition Should Be Granted Because the Circuit Courts Are Confused About the Scope of the Commerce Power and the Application of *Lopez* and *Morrison*

This case is symptomatic of the confusion that reigns among the circuit courts over Congress' power to regulate intrastate, noncommercial activity under the Commerce Clause. Within a week, both the Fifth Circuit in this case and the D.C. Circuit in *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, upheld the ESA as applied to noncommercial local species against a Commerce Clause challenge. "Both cases reach the same result, but the legal analysis used to get there could hardly be more different." Jud Mathews, *Turning the Endangered Species Act Inside Out?*, 113 Yale L.J. 947 (2004). To find "substantial effects" on interstate commerce in this case, the Fifth Circuit held that "taking" of all threatened and endangered species could be aggregated as part of one interdependent web. The D.C. Circuit also found the requisite commerce connection but on different grounds. That court held that "the true object of ESA regulation is not endangered species, but the commercial development that threatens them." *Id.* at 947.

Although these circuit courts both sought to protect the listed species, Arroyo toads in *Rancho Viejo* and subterranean insects in this case, it was as if they were reading two different laws. *Id.* "This curious divergence can only be understood in light of the unsettled state of Commerce Clause jurisprudence following [] *Lopez* and [] *Morrison*." *Id.* With respect to determining the limits of the commerce power, those cases provided the lower courts an uncertain analytical structure. *Id.* This uncertainty is attributable to "the failure of the *Lopez* and *Morrison* framework to meet the Supreme Court's stated aspiration to distinguish 'between what is truly national and what is truly local.'" *Id.* at 948.

Numerous analytical difficulties have surfaced in the circuit courts that have tried to reconcile the "take" provision of the ESA with this Court's view of the commerce power under *Lopez* and *Morrison*. *See* Lilly Santaniello *Commerce Clause Challenges to the Endangered Species Act's Regulation of Intrastate Species on Private Land*, 10 Hastings W.- NW. J. Envtl. L. & Pol'y 39, 40 (2003). One analytical issue giving the lower courts trouble is identification of the activity regulated. *Id.* For example, when the building of a hospital threatens to harm an endangered fly (*National Association of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997)), is the regulated activity the "taking" of the fly or the construction of the hospital? Santaniello, *supra*, at 40. A second analytical difficulty for the lower courts is determining what constitutes economic activity. *Id.* If a rancher shoots a wolf to protect his livestock (*Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000)), is the economic motivation of the rancher enough to make the "taking" an economic activity for Commerce Clause purposes? Santaniello, *supra,* at 40. A third difficulty arises when the lower courts try to determine whether the "aggregation principle" applies to intrastate, noncommercial species, as in this case and *Rancho Viejo*. Further, how does aggregation of noneconomic activity relate to the "larger regulatory scheme" theory that featured so prominently in *Lopez* and *Morrison*? *Id.* Finally, what is the significance of this Court's statements that Commerce Clause enactments must not obliterate the distinction between what is national and what is local? *Id.*

So far, the majority of circuit judges that have considered the issue have upheld the ESA against Commerce Clause challenges. *Id.* at 62. But in each case the judges were split and differing rationales were offered to support the decision. Also, the dissents have been vehement. *Id.* Judge Luttig, writing for the dissent in *Gibbs*, and Judge Sentelle, writing for the dissent in *National Association of Home Builders*, argued strenuously that the section 9 "take" provision of the ESA cannot be upheld

under *Lopez* and *Morrison* as applied to intrastate, noncommercial species. *Id.* And, of course, the six judge dissent to the denial of rehearing in this case is remarkable for the force with which it rebutted the panel decision upholding the ESA as applied to noncommercial cave-dwelling insects found only in the State of Texas.

The divergence of views expressed in every circuit court that has addressed an as-applied challenge to the ESA cries out for review of this case. So does the existence of irreconcilable rationales adopted by these circuits to uphold the ESA, such as the contradictory reasoning on which the Fifth Circuit relied in this case and the D.C. Circuit relied in *Rancho Viejo*. *See Rancho Viejo v. Norton,* 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Sentelle, J., dissenting) (noting that *Rancho Viejo* was in direct conflict with the decision in this case).

But there are other conflicts that warrant review of this case. Many circuits that have considered the scope of the Commerce Clause as applied to other laws have taken a view of *Lopez* and *Morrison* that cannot be squared with the decision of the Fifth Circuit in this case to aggregate noncommercial activity.

For example, in *United States v. Pappadopoulos*, 64 F.3d 522 (9th Cir. 1995), the defendants were charged with violating the federal arson statute by burning their home. The prosecution asserted that the home was "used in interstate commerce" because it received natural gas from an out-of-state source. *Id.* at 525. But the Ninth Circuit rejected this argument, noting that

> where Congress seeks to regulate a purely intrastate noncommercial activity that has traditionally been subject to exclusive regulation by state or local government . . . [it] must satisfy the jurisdictional requirement by pointing to a "substantial" effect on or connection to interstate commerce.

Id at 527. *See also United States v. Lynch*, 282 F.3d 1049, 1054 (9th Cir. 2002) (Robbery does have an economic component; however, that economic component must rise above the simple, though forced, economic transaction between two individuals. Otherwise, almost any violent property crime would be transformed into a federal offense, contrary to the teachings of *Morrison*.).

In another arson case, the Eleventh Circuit held that the aggregation principle was not applicable to "intrastate, *non-economic activity.*" *United States v. Ballinger,* 312 F.3d 1264, 1270 (11th Cir. 2002). Ballinger had pled guilty to burning five churches in Georgia. The district court found that the churches involved had all purchased various supplies from out-of-state merchants, and that the defendant had traveled in interstate commerce, purchasing goods and services *en route,* while committing the arsons. *Id.* at 1266-1267. The defendant was charged with violating the federal arson statute which prohibited arson which "'is in or affects interstate . . . commerce.'" *Id.* at 1268 (*quoting* 18 U.S.C. § 247(b)). But the Eleventh Circuit rejected the government's aggregation theory:

> Where such regulation [of intrastate, non-economic activity] is at issue, the Constitution requires that the activity, by *itself,* have economic consequences that *substantially affect* interstate commerce. No aggregation of local effects is permissible to elevate a non-economic activity's insubstantial effect on interstate commerce into a substantial one in order to support federal jurisdiction.

Id. at 1270 (citation omitted).

The proper inquiry, the court held, was whether the arsons themselves had a substantial effect on interstate commerce. Because the court found the evidence (including Ballinger's travel and the churches' supply purchases) insufficient to prove

a substantial effect on interstate commerce, it reversed the conviction.

The Third Circuit in *United States v. McGuire,* 178 F.3d 203, 210 (3d Cir. 1999), also rejected the conclusion that noncommercial activity could be aggregated to "support the exercise of federal jurisdiction after *Lopez*." *Id.* There, the defendant was charged with blowing up a car which was occasionally used by a catering business, and which contained a carton of orange juice which had been shipped interstate. Although the court declined explicitly to address whether the Commerce Clause requires that each case demonstrate a substantial effect on interstate commerce, *id.* at 211 n.7, it did note that "*Lopez* preclude[s] applying the 'aggregation test' so broadly that it sweeps within its reach every use of every property that has an effect on interstate commerce no matter how diluted." *Id.* at 211. The *McGuire* court therefore reversed the conviction, because employing the aggregation principle in the manner the prosecution sought would have "obliterat[ed] the intrastate/interstate distinction that was reinforced under *Lopez*." *Id.*

"We do not believe," the court said, "that the Supreme Court required Congress to include a jurisdictional element under *Lopez* only to have courts interpret the resulting statutes in such a way as to remove it." *Id.* at 212. *See also United States v. Rodia,*194 F.3d 465, 477 (3d Cir. 1999) ("a number of courts have applied *Wickard*'s aggregation concept to all activities, economic and non-economic, without acknowledging 'that *Lopez* approvingly discussed the aggregation principle only in conjunction with economic activity' " (*quoting United States v. Hickman,* 179 F.3d 230, 238 (5th Cir. 1999) (Higginbotham, J., dissenting))).

The Fifth Circuit has been one of those courts that has read the jurisdictional element out of federal statutes and applied *Wickard*'s aggregation concept to all activities,

economic and noneconomic alike. After *Lopez,* the Fifth Circuit held that prosecutions under the Hobbs Act did not require the government to prove in each case a substantial effect on interstate commerce as an element of the crime. *United States v. Robinson,* 119 F.3d 1205, 1215 (5th Cir. 1997). Instead, the court held that such prosecutions were within Congress' power whenever that type of criminal activity, *if repeated elsewhere in greater numbers*, would affect interstate commerce. The *Robinson* rule was subsequently upheld by an evenly divided *en banc* court in *United States v. McFarland*, 311 F.3d 376 (5th Cir. 2002), but the dissenters pointed out that *Lopez* and *Morrison* explicitly precluded the use of the aggregation principle in cases involving intrastate noncommercial conduct. *See id.* at 402. *See also United States v. Collins*, 40 F.3d 95, 100 (5th Cir. 1994).

This same conflict of opinion has emerged again in this case. The Fifth Circuit has upheld the ESA against a constitutional challenge by aggregating intrastate, noncommercial "takes" of cave-dwelling insects with the "takes" of all other protected species. This decision not only conflicts with the "substantial effects" standard this Court set forth in *Lopez* and *Morrison,* it also conflicts with the Commerce Clause analysis adopted by other circuits.

This case is emblematic of the confusion in and among the circuit courts about the scope of the Commerce Clause and the application of *Lopez* and *Morrison* to intrastate, noncommercial activity. A resolution of the questions presented by this case would assist the lower courts in adopting a more uniform approach to Commerce Clause analysis. Therefore, the petition should be granted.

2. The Petition Should Be Granted Because This Case Raises a Fundamental Federal Question of Great Importance That Affects Every Citizen

This is not the first time this Court has been petitioned to decide if the Endangered Species Act goes too far in prohibiting the "taking" of certain isolated species. However, this Court has not yet addressed this question. This Court has denied certiorari in three other cases raising the same important issue presented here. *See National Association of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied* (whether regulation of local fly under the ESA exceeds the commerce power); *Building Industry Association of Superior California v. Norton*, 247 F.3d 1241 (D.C. Cir. 2001), *cert. denied* (whether regulation of local fairy shrimp under the ESA exceeds the commerce power); and, *Rancho Viejo v. Norton*, 334 F.3d 1158 (D.C. Cir. 2003), *cert. denied* (whether regulation of local toad under the ESA exceeds the commerce power).

As this Court has observed, the environment is "a matter in which it is common to think all persons have an interest." *Bennett v. Spear*, 520 U.S. at 165. Likewise, everyone has an interest in the "rule of law." But as this case demonstrates, the lower federal courts have traded our most fundamental constitutional safeguards for speculative environmental protections.

Those safeguards require a federal government of limited powers. *See* U.S. Const. Art. I, § 8. The Framers understood this:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.

The Federalist No. 45, at 292-293 (James Madison) (C. Rossitor ed. 1961).

This Court has expressly acknowledged that this division is necessary to protect our fundamental liberties:

> Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.

Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

But if Congress can pass laws under the commerce power regulating any individual activity that in the aggregate threatens protected species, as the court held it could in this case, there is no human endeavor beyond federal control: "[D]epending on the level of generality, any activity can be looked upon as commercial." *Lopez*, 514 U.S. at 565.

Even the Fifth Circuit recognized this problem:

> Whether and how Congress may apply the aggregation principle are controversial questions. The pitfalls are apparent. For example, any imaginable activity of mankind can affect the alertness, energy, and mood of human beings, which in turn can affect their productivity in the workplace, which when aggregated together could reduce national economic activity. Such reasoning would eliminate any judicially enforceable limit on the Commerce Clause, thereby turning that clause into what it most certainly is not, a general police power.

United States v. Ho, 311 F.3d 589, 599 (5th Cir. 2002).

The Fifth Circuit failed to heed its own warning, however. While the circuit panel asserted its decision in this case would not impinge on areas of traditional state concern, such as "land use or wildlife preservation," *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622, 640 (5th Cir. 2003), six judges on the circuit disagreed, pointing out that when the Fish and Wildlife Service lists a species, the federal government has "functional control over the land designated as its habitat." *GDF Realty Investments v. Norton*, 362 F.3d 286, 292 (5th Cir. 2004) (dissenting from the denial of rehearing *en banc*).

If that authority is not directed at regulating interstate commerce, these judges observed, it "would result in a significant impingement of the States' traditional and primary power over land and water use." *Id.* (citing this Court's decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 173-174 (2001). And, in fact, it has.

Shortly after Congress passed the ESA in 1973, this Court declared the Act the most comprehensive legislation ever passed by any nation for the protection of species and that enforcement of the Act must occur "whatever the cost." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 179, 184 (1978). This "species first, people last" reading of the ESA gave more power to the federal government than any other environmental law and set up an inevitable constitutional conflict. According to the Fish and Wildlife Service, as reported on its website, over 1,250 species of plants and animals have been listed across the nation. As evidenced by this case, and others like it, federal officials assert plenary authority over land and water resources all across the country where listed species exist.

In his article, *The Commerce Clause Appropriately Defined Within a Universe Without Distinction: The Federal Endangered Species Act's Unconstitutional Application to*

Intrastate Species, 25 T. Jefferson L. Rev. 649 (2003), Justin G. Reden considers whether application of the ESA to intrastate, noncommercial species satisfies this Court's Commerce Clause test as set forth in *Lopez* and *Morrison*. He concludes it does not:

> There is no rational basis upon which Congress could conclude that such intrastate species have sufficient ties to interstate commerce to justify regulation under the Commerce Clause within the permissible scope defined by modern Supreme Court jurisprudence.

Id. at 650.

As expressed by Reden,

> Congress has unconstitutionally transformed the Commerce Clause into a tool used to slowly and impermissibly unsettle the balance of power between the States and the federal government, placing almost unfettered jurisdictional power in the hands of the federal government.

Id.

As a result, Reden calls for judicial review:

> Where federal legislation, such as the ESA, unconstitutionally arrogates to the federal government powers properly belonging to the individual States, the judicial branch must intervene and enforce the notions of federalism the founding fathers envisioned.

Id.

Reden is not alone. The dissent to the denial of rehearing *en banc* in this case veritably screams for Supreme Court review. In a five page opinion authored by Judge Edith Jones

and joined by Judges Jolly, Smith, DeMoss, Clement, and Pickering, the panel's errors are laid bare. First, the dissent points out the inconsistency of the panel's decision that concedes, on the one hand, there is no link between the cave species and any sort of commerce and, on the other hand, applies the ESA to the "taking" of these species because "the Cave Species takes would occur as a result of plaintiffs' planned commercial development." *GDF*, 362 F.3d at 291. This is ironic because the panel had previously rejected this argument when it explained that focusing on the underlying activity would allow application of unconstitutional statutes to commercial actors but not noncommercial actors and would result in unlimited congressional authority to regulate intrastate activities. *Id.*

Second, the panel stated the "taking" of the cave species could be regulated because the "take" of any species would undermine the purpose of the ESA to protect ecosystems and threaten the interdependent web of all species. *Id.* However, the dissent saw this as a thinly disguised attempt to justify the aggregation of noncommercial activity twice rejected by this Court in *Lopez* and *Morrison*. "An even more obvious dissonance between the panel opinion and *Lopez*, *Morrison* and the Constitution," the dissent added, "is that the Commerce Clause regulates commerce, not ecosystems." *Id.* at 292.

Third, while the panel acknowledged this Court's concern that federal legislation recognize a limiting principle in the exercise of the commerce power so as not to obliterate the distinction between what is local and what is national, the dissent found the panel opinion plainly "tramples that precept." *Id.*

Finally, the panel concluded that the connection between cave species "takes" and a substantial effect on interstate commerce is not attenuated. *Id.* at 292-293. But the dissent found that conclusion illogical and remarked that aside from

that problem, the federal circuits, including the Fifth Circuit, have recognized that otherwise constitutional enactments may be invalid in some applications, as the ESA was in this case: "[M]any applications of the ESA may be constitutional, but this one simply goes too far." *Id.* at 293. To be true to this Court's Commerce Clause decisions, therefore, the dissent calls for further appellate review. *Id.*

The question before this Court is narrow and specific. This Court is called on to determine if the "take" provision of the ESA goes too far as applied to six noncommercial cave-dwelling insects in a small part of a large state. Addressing that question will assist the lower courts in applying the "substantial effects" test under *Lopez* and *Morrison*. This Court need not address the validity of the ESA generally. Nor would invalidation of the Act, as applied in this case, put all intrastate species at risk of extinction. Other federal and state laws are available to protect such species and their habitats. For example, the State of California, which is home to the largest number of listed species, has it's own Endangered Species Act, and federal laws like the Clean Water Act are enforced to protect wetlands and other waters which provide habitat to threatened and endangered species. For these reasons, this Court should grant the petition.

CONCLUSION

This Court has never upheld federal regulation of an intrastate activity, based on that activity's substantial effects on interstate commerce, unless that activity has been economic in nature. To do so would allow Congress unlimited regulatory authority under the Commerce Clause to rival the police powers of the states. But, the Fifth Circuit has given Congress such authority in this case through the ESA. Therefore, to bring that circuit and other federal courts in line with this Court's

Commerce Clause jurisprudence and constitutional principles of federalism, this Court should grant the petition for writ of certiorari and overturn the decision below.

DATED: September, 2004.

Respectfully submitted,

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IN THE

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GDF REALTY INVESTMENTS, LTD.; PARKE PROPERTIES I, L.P.; AND PARKE PROPERTIES II, L.P.,
Petitioners,

v.

GALE A. NORTON, SECRETARY OF THE INTERIOR, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE STATES OF TEXAS, ALASKA, DELAWARE, AND NORTH DAKOTA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does Congress's authority "[t]o regulate Commerce . . . among the several states," U.S. CONST. art. I, § 8, cl. 3, permit the application of the Endangered Species Act to purely local activities that might potentially harm the habitat of wholly intrastate and commercially irrelevant species of cave-dwelling arthropods?

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IN THE

Supreme Court of the United States

No. 03-1619

GDF REALTY INVESTMENTS, LTD.; PARKE PROPERTIES I, L.P.; AND PARKE PROPERTIES II, L.P.,

Petitioners,

v.

GALE A. NORTON, SECRETARY OF THE INTERIOR, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE STATES OF TEXAS, ALASKA, DELAWARE, AND NORTH DAKOTA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*

The States have a significant interest in maintaining their sovereign control over wildlife regulation, land-use planning, and other matters of traditional state concern within their borders. Although the States recognize Congress's authority to regulate interstate commerce, the States' authority does not give way when the subject of Congress's regulation has no real connection to interstate commerce. The aggregation rationale applied by the Fifth Circuit permits Congress to regulate matters of purely state concern without any real connection to interstate commerce, in conflict with *United States* v. *Lopez*, 514 U.S. 549 (1995), *United States* v. *Morri-*

son, 529 U.S. 598 (2000), *United States* v. *Wang*, 222 F.3d 234 (CA6 2000), and *Gibbs* v. *Babbitt*, 214 F.3d 483, 497 (CA4 2000).

The States have demonstrated that they are able and willing to protect endangered species within their borders, and the vast majority of States have enacted regulatory schemes for ensuring that protection. The amici States are filing this brief to assert their interest in restoring state control over their land-use decisions and returning to the federal-state balance of power secured by the Constitution.

REASONS FOR GRANTING THE PETITION

There is no justification for the aggregation principle applied by the Fifth Circuit. Congress cannot generalize and aggregate the economic effects of: (1) carrying guns to regulate the carrying of guns in a school zone, (2) violence against women across the country to regulate local crimes against women, (3) robbery, arson, or murder to reach purely noncommercial incidents of those crimes, or (4) interstate movement of migratory birds to regulate purely intrastate locations visited by those birds. Nor may Congress regulate the taking of purely intrastate species that have no connection to interstate commerce and no connection to species that do. The Fifth Circuit's holding to the contrary conflicts with the interpretation of the Court's Commerce Clause precedent by other courts of appeals and leaves the States with grave uncertainty regarding the degree to which the commerce power extends Congress's reach to police land-use decisions and other traditional areas of state concern.

"[T]he Framers crafted the federal system of government so that the people's rights would be secured by the division of power." *Morrison*, 529 U.S. at 616 n.7. Under the Commerce Clause, "[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." *Lopez*, 514 U.S. at 560. However, "[t]he

Constitution requires a distinction between what is truly national and what is truly local." *Morrison*, 529 U.S., at 617-18. The Fifth Circuit's understanding of when an activity "substantially affects interstate commerce" obliterates that distinction, infringing on the States' authority to regulate what is truly local.

I. THE DEEPENING CONFLICT AMONG THE COURTS OF APPEALS LEAVES THE STATES WITHOUT CERTAINTY REGARDING THE LIMITS OF CONGRESS'S POWER TO REGULATE MATTERS OF LOCAL CONCERN.

Because the States require certainty regarding what intrastate activities Congress may and may not regulate, the Court should grant the petition and reject the limitless theory adopted by the Fifth Circuit. When Congress uses the Commerce Clause to intrude into areas of traditional state authority, the Court applies heightened scrutiny, recognizing its "particular duty to ensure that the federal-state balance is not destroyed." *Lopez*, 514 U.S., at 580-81 (Kennedy, J., concurring) (citations omitted). In *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001), the Court observed that its concern with a regulation that pushes the limits of congressional authority "is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Id.*, at 173. When a statute "upsets the federal balance to a degree that renders it an unconstitutional assertion of the commerce power," judicial intervention is required. *Lopez*, 514 U.S., at 580 (Kennedy, J., concurring). "Congress may regulate intrastate activity that has a 'substantial effect' on interstate commerce." *Id.*, at 557 (quoting *United States v. Darby*, 312 U.S. 100, 119-20 (1941)). However, since *Morrison*, the courts of appeals have adopted divergent standards for applying the "substantial effect" test that would lead to contradictory results on similar facts. In

other words, a given application of a federal statute might be a constitutionally valid exercise of the commerce power in one circuit but constitutionally invalid in another.

The Sixth Circuit, for example, in determining the scope of the commerce power, rejects reference to long chains of causal effects of the type necessary to support the Fifth Circuit's application of the aggregation principle under its theory that the conjectured "interdependent web" among all species, *GDF Realty Invs., Ltd.* v. *Norton*, 326 F.3d 622, 640 (CA5 2003), permitted Cave Species takes to be aggregated with takes of all other endangered species, including species relevant to commerce, to find a substantial effect on interstate commerce. *United States* v. *Wang*, 222 F.3d 234 (CA6 2000), rejected application of the Hobbs Act, 18 U.S.C. §1951, to convict Wang for robbing a private residence although the robbery included $1,200 belonging to a restaurant doing business in interstate commerce. *Wang*, 222 F.3d, at 240. The court explained that finding a substantial effect on interstate commerce in that case would require acceptance of what it termed the "butterfly effect" or, alternatively, "the 'dog, dog bite pig' theory of causation," which the court declined to do, finding it inconsistent with *Lopez* and *Morrison*. *Id.*, at 239 & n.1. The Fifth Circuit's acceptance of the analogous "cave bug effect" as a basis for exercising the commerce power in this case is in direct conflict with *Wang*'s application of *Lopez* and *Morrison*.

Applying the same ESA provision at issue in this case, the Fourth Circuit held that the provision could be constitutionally applied to regulate takes of a particular species—the red wolf—that the court specifically found had an effect on commercial activities. *Gibbs*, 214 F.3d, at 497 ("The protection of the red wolf on both federal and private land substantially affects interstate commerce through tourism, trade, scientific research, and other potential economic activities."). If the Fourth Circuit accepted the Fifth Circuit's

"interdependent web" theory, its finding that the red wolf itself has an effect on commerce would be superfluous. Presumably free-ranging, carnivorous wolves are at least as "interdependent" with other species as are minute arthropods that spend their entire lives in an intrastate cave. By recognizing that the commercial relevance of the particular species in question is pertinent to whether a particular application of the ESA take provision is constitutionally valid, the Fourth Circuit applies a limitation that conflicts with the boundless rule adopted by the Fifth Circuit, which permits not only federal regulation of takes of any species but also federal regulation of countless other activities that themselves have no economic effect.

The D.C. Circuit has managed to directly conflict with the Fifth Circuit while, at the same time, adopting a similarly expansive view of the commerce power that also permits application of the ESA take provision to regulate takes of any species, regardless of the particular species' connection to commerce (or utter lack thereof). *Rancho Viejo, LLC* v. *Norton*, 323 F.3d 1062 (CADC 2003), held that the ESA take provision was validly applied to prohibit development in a portion of California inhabited by the arroyo toad—which, like the Cave Species, is a wholly intrastate beast with no known value in commerce—because the back-end effect of applying the take provision, *i.e.*, the thwarting of a planned housing development, was economic in nature. *Id.*, at 1072-73. Observing that "[t]he ESA does not purport to tell toads what they may or may not do," the court held that the federal government may tell Rancho Viejo what it may or may not do with respect to noncommercial, intrastate toads because Rancho Viejo and its conduct "have a plainly commercial character." *Id.*, at 1072.

The D.C. Circuit thus accepted the theory for upholding applications of the take provision that the Fifth Circuit flatly rejected in this case. *See GDF*, 326 F.3d, at 627, 636

(holding that the district court erred in relying on the fact that it was "hard-pressed to find a more direct link to interstate commerce than a Wal-Mart" to uphold the application of the take provision). However, under the D.C. Circuit's theory, which focuses on the character and intent of the actor being regulated rather than the species that is the subject of the regulation, Congress can forbid any commercial actor from taking a Cave Species, regardless of species "interdependence," but perhaps could not forbid a noncommercial actor from doing so. *See Rancho Viejo, LLC*, 323 F.3d, at 1080 (Ginsburg, C.J., concurring) (opining that the commercial character *vel non* of the actor provides "a logical stopping point" to the court's rationale, but acknowledging that "it goes unremarked in the opinion of the court"). By extension of the D.C. Circuit's rationale, Congress could, perhaps, prohibit the owner of a gun store from transporting guns through a school zone, even if regulation of the same activity by another individual is purely a matter of state concern.

Those conflicts leave the States in doubt regarding the extent to which Congress's commerce power permits it to intervene in matters of traditional state concern. An application of the ESA's take provision to a given species could be unquestionably valid, valid only if the particular species has commercial relevance, or valid only if the actor being regulated is commercial in character depending on which court of appeals is deciding the validity of the federal regulation. Moreover, the Fifth Circuit's rationale permitting aggregation of noneconomic activity with economic activity to find a substantial effect on interstate commerce has broad ramifications that would bring virtually any conceivable intrastate activity within reach of the commerce power. And the D.C. Circuit's approach would permit unbridled federal regulation of at least any activity conducted by intrastate commercial actors. The Court's guidance is badly needed to

resolve those conflicts and provide the States with the certainty they need for the prudent exercise of the police powers reserved to them by the Constitution.

II. THE FIFTH CIRCUIT'S HOLDING DEMONSTRATES THE NEED FOR THE COURT TO CONSTRAIN CONGRESSIONAL REGULATION OF NONECONOMIC INTRASTATE ACTIVITY.

A. In Conflict With *Lopez* And *Morrison*, The Fifth Circuit's New Commerce Clause Jurisprudence Permits Congressional Interference With Matters Of Purely Intrastate Concern That Have No Relation To Interstate Commerce.

The Fifth Circuit's aggregation of Cave Species takes, which have no effect on interstate commerce, with takes of all endangered species nationwide establishes a limitless principle under which no intrastate activity would be beyond the reach of Congress's Commerce Clause power. That result cannot be squared with the Court's admonitions that the commerce power establishes a constitutional balance that respects the States' interests in regulating traditionally local concerns. In resolving the conflict among the circuits, the Court should reject the Fifth Circuit's limitless conception of the commerce power.

The court of appeals correctly found that the "tiny bugs, which dwell solely in the caves and never emerge on the surface of the land," *GDF Realty Invs., Ltd.* v. *Norton*, 362 F.3d 286, 287 (CA5 2004) (Jones, J., dissenting from denial of rehearing en banc), themselves have no substantial effect on interstate commerce. *GDF*, 326 F.3d, at 637-38. Indeed, the Cave Species have no effect on "commerce" of any kind. The regulation of Cave Species takes is therefore a purely

intrastate, noncommercial phenomenon. There is no linkage from the Cave Species to any commercial activity through which their existence could affect interstate commerce.

If, as the Fifth Circuit held, the aggregation principle can properly be applied to permit aggregation of an isolated, purely intrastate, noncommercial activity with activity that does affect interstate commerce based solely on a superficial similarity, there will be no intrastate activity that the commerce power cannot reach. For example, carrying a gun in a school zone is, in many ways, like carrying a gun aboard a commercial airliner. The latter activity may well have an economic effect on interstate commerce. The former does not, and *Lopez* establishes that Congress cannot merely generalize by aggregation to regulate the carrying of guns. *Lopez*, 514 U.S., at 567 (declining to "pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States").

It simply cannot be consistent with the Court's view of the commerce power, as articulated in *Lopez* and *Morrison*, to aggregate Cave Species takes with takes of all other endangered species in a way that circumvents the limitations on Congress's power to interfere with traditional state concerns. *Lopez*, discussing limitations described in *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), emphasized that "the scope of the interstate commerce power 'must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local.'" *Lopez*, 514 U.S., at 557. *Morrison* reaffirmed that emphasis on the constitutional balance between state and national spheres of interest. *Morrison*, 529 U.S., at 617-18.

As the uncontroverted record evidence demonstrates, there is no connection—not even an indirect and remote one—between Cave Species takes and takes of species that might have some effect on interstate commerce. By comparison, the aggregation principle as applied in *Wickard* v. *Filburn*, 317 U.S. 111 (1942), "which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity," *Lopez*, 514 U.S., at 560, involved a clear linkage from the regulated activity—the growing of wheat—and the effect on commerce through the activity's effect on supply and demand in the wheat market. *Wickard*, 317 U.S., at 127-28. Although the individual farmer's effect was trivial, multiplication produces a substantial direct effect on commerce.

In contrast to *Wickard*, the chain of effects from a Cave Species take stops at the mouth of the cave. The Fifth Circuit's "interdependence of species" rationale—as applied to the Cave Species—is, at best, the type of unsupportable conjecture that the court rightly rejected when considering FWS's claim that takes of Cave Species, standing alone, had a direct relationship with interstate commerce. Moreover, the only evidence in the record tends to disprove that conjecture: the Cave Species are not interdependent with anything outside their caves.

As the Court has recognized, land use is traditionally an area of state concern. *See, e.g.*, *Solid Waste Agency*, 531 U.S., at 174; *Lake Country Estates, Inc.* v. *Tahoe Reg'l Planning Agency*, 440 U.S. 391, 402 (1979). The conservation and protection of wildlife is also uniquely within the States' police power, and the States enjoy great latitude in determining the means for that protection. *See Lacoste* v. *Dep't of Conservation*, 263 U.S. 545, 552 (1924); *Nat'l Ass'n of Home Builders* v. *Babbitt*, 130 F.3d 1041, 1064 (CADC 1997) (Sentelle, J., dissenting); *accord Hughes* v. *Oklahoma*, 441 U.S. 322, 337 (1979) (recognizing that wildlife protec-

tion is a legitimate local purpose, similar to the States' interest in protecting the health and safety of their citizens). All powers not delegated to the federal government are reserved to the States or the people. U.S. CONST. amend. X; *Alden v. Maine*, 527 U.S. 706, 713-14 (1999). FWS's application of the ESA take provision to forbid development of Texas land because it is the habitat for the noncommercial, intrastate Cave Species infringes on the States' ability to regulate land use and wildlife within their borders.

The ESA as applied to purely intrastate species improperly treads on the States' sovereign interest in regulating land use and finding their own balance in permitting commercial development while preserving endangered intrastate species. By its terms, the ESA's take provision prohibits the taking of any endangered species, regardless of its connection to interstate commerce. 16 U.S.C. §§1538(a)(1), 1532(19). The federal regulations define "take" expansively to include any habitat modification or degradation that kills or injures wildlife, potentially including the proposed land development in this case. 50 C.F.R. §17.3.

The take provision, at least as applied to intrastate species, is not a valid exercise of Congress's power under the Commerce Clause. By regulating purely intrastate species without any link to commerce, the ESA ignores that the federal government is one of limited, enumerated powers. *See* U.S. CONST. art. I, §8; *Lopez*, 514 U.S., at 552; *New York* v. *United States*, 505 U.S. 144, 155 (1992). The powers delegated to the federal government are few and defined, while those that remain in the state governments are numerous and indefinite. *Lopez*, 514 U.S., at 552 (citing THE FEDERALIST NO. 45, pp. 292-93 (Clinton Rossiter ed. 1961)); *Morrison*, 529 U.S., at 618 & n.8. The ESA's take provision—as applied in the manner upheld by the Fifth Circuit—turns this balance on its head by granting the federal government essentially a broad police power over endangered

species, regardless of their connection to interstate commerce. That application goes beyond the scope of Congress's authority under the Commerce Clause.

The division of authority in our federal system is not merely an empty distinction of a bygone era. *See Lopez*, 514 U.S., at 552 (citing *Gregory* v. *Ashcroft*, 501 U.S. 452, 458 (1991)). Rather, it continues to have force as a means of "secur[ing] to citizens the liberties that derive from the diffusion of sovereign power." *New York*, 505 U.S., at 181 (quoting *Coleman* v. *Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)). As the Court recognized in *Lopez*, "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Lopez*, 514 U.S., at 552 (quoting *Gregory*, 501 U.S., at 458). To restore this federal balance, the Court should declare the take provision unconstitutional as applied to purely intrastate species.

B. The Fifth Circuit's Holding Demonstrates That the Court Needs to Delineate the "Substantial Effect" Analysis.

Lopez and *Morrison* both suggested that, if a particular instance of an activity cannot be shown to have a *substantial* effect on interstate commerce, that instance must at least be economic in nature and have *some* effect to be the proper subject of aggregation. *See Lopez*, 514 U.S., at 560 ("Even *Wickard* . . . involved economic activity in a way that the possession of a gun in a school zone does not."); *Morrison*, 529 U.S., at 610 ("[A] fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case."). However, *Morrison* declined to "adopt a categorical rule against aggregating the effects of noneconomic activity in order to decide these cases." *Morrison*, 529 U.S., at 613. The court of appeals relied in part on that language in *Morrison* to conclude that

the noneconomic takes of Cave Species could be aggregated with takes of all species to satisfy the "substantial effect" test. *See GDF*, 326 F.3d, at 630. The limitless result of applying the aggregation principle as the Fifth Circuit did demonstrates that it is time for the Court to adopt the categorical rule that the activity being regulated must itself be economic in nature before it can be aggregated with all other occurrences of similar activity in order to find a substantial effect on interstate commerce.

Lopez's review of Commerce Clause cases demonstrates that when the Court has sustained federal regulation of intrastate activity based on the activity's substantial effect on interstate commerce, the activity in question has been some sort of economic endeavor. *Morrison*, 529 U.S., at 611; *Lopez*, 514 U.S., at 559-60. Prior to its holding in this case, the Fifth Circuit recognized that, in determining whether an activity substantially affects interstate commerce, the first question a court should ask is "whether the regulated activity is an activity economic in nature." *Groome Res., Ltd.* v. *Parish of Jefferson*, 234 F.3d 192, 205 (CA5 2000) (citing *Morrison*, 529 U.S., at 611). But the Cave Species, which the Fifth Circuit has now held are within the sphere of federal regulation, are unquestionably not commercial in character. Nor are the alleged takes of the species in any way commercial. Like the possession of guns in *Lopez*, takes of species are not linked to commerce under the ESA and no jurisdictional element in the statute requires it. *See Lopez*, 514 U.S,. at 561-62. The ESA's regulation of intrastate species that have no connection to commerce cannot be justified by the Commerce Clause if that provision is to have any meaning as a limit on federal power.

By the Court's method of statutory interpretation in *Solid Waste Agency* and *Jones* v. *United States*, 529 U.S. 848 (2000), it further confirmed that the commercial nature *vel non* of the regulated activity is critical to the Commerce

Clause analysis. *Jones* refused to construe the federal arson statute to encompass arson of noncommercial buildings in part because that construction would raise "grave and doubtful constitutional questions" in light of *Lopez*. *Jones*, 529 U.S., at 857-58. *Solid Waste Agency*, on a similar rational, declined to construe the "Migratory Bird Rule" as permitting federal regulation of an intrastate sand and gravel pit when that regulation "would result in a significant impingement of the States' traditional and primary power over land and water use." *Solid Waste Agency*, 531 U.S., at 173-74. If the regulated activities at issue in *Jones* and *Solid Waste Agency*—which themselves had no effect on interstate commerce—could have been aggregated with the numerous similar activities that do affect interstate commerce, there would have been no constitutional question to avoid and the Court's avoidance rationale would have been meaningless.

By upholding the ESA's take provision as applied to purely intrastate, noncommercial species, the Fifth Circuit has squarely raised a grave constitutional question similar to those avoided in *Jones* and *Solid Waste Agency*. Because the court of appeals's "constitutionally limitless theory," *GDF*, 362 F.3d, at 287 (Jones, J., dissenting), would bring virtually any activity within the ambit of federal-government control, the Court should explain unequivocally that the aggregation principle is properly applied only to aggregate instances of activities that are themselves economic in nature.

III. THE STATES ARE ABLE AND WILLING TO PROTECT THEIR INTRASTATE NATURAL RESOURCES.

The Court's recognition that the Constitution reserves the general police power to the States has not left armed criminals free to roam the Nation's school zones or American women without redress for violence. *See Lopez*, 514 U.S., at 581-82 (Kennedy, J., concurring) (collecting data on state and

local efforts to keep guns out of schools); Julie Goldscheid & Risa E. Kaufman, *Seeking Redress for Gender-Based Bias Crimes—Charting New Ground in Familiar Legal Territory*, 6 MICH. J. RACE & L. 265, 269-71 (2001) (noting that several states already had laws that "provide redress for gender-motivated violence" and that "[i]n the wake of the *Morrison* ruling, several state legislatures have considered state civil rights provisions with language tracking that of the VAWA Civil Rights Remedy"). The States have the authority, duty, and ability to police matters of intrastate concern.

Accordingly, nearly all the States have enacted regulations designed to preserve endangered wildlife within their borders. *See* ALASKA STAT. §§16.20.180-.210; CAL. FISH & GAME CODE §§2050-2115.5; COLO. REV. STAT. §§33-2-101-108; CONN. GEN. STAT. §§26-303-316; DEL. CODE tit. 7 §§601-605; FLA. STAT. §§372.072-.074; GA. CODE §§12-6-171-176, 27-3-130-133; HAW. REV. STAT. §§195D-2-31; ILL. COMP. STAT. 10/1-10/11; IND. CODE §§14-22-34-1-21; IOWA CODE §§481B.1-.9; KAN. STAT. §§32-957-963, 32-1009-1012, 32-1033; KY. REV. STAT. §§146.600-.619, 150.183, 150.990; LA. REV. STAT. §§56:1901-:1907; ME. REV. STAT. tit. 12, §§7751-7759; MD. CODE, NAT. RES. I §§4-2A-01-09, 10-2A-01-09; MASS. GEN. LAWS ch. 131A, §§1-6; MICH. COMP. LAWS §§324.36501-.36507; MINN. STAT. §§84.0894-.0895; MINN. R. 6134.0100-0400; MISS. CODE §§49-5-101-119; MONT. CODE §§87-5-101-131; NEB. REV. STAT. §§37-801-811; NEV. REV. STAT. §§244-386-.388, 503.584-.660; N.H. REV. STAT. §§212-A:1-A:15; N.J. Stat. §§23:2A-1-14; N.M. STAT. §§17-2-37-46; N.Y. ENVTL. CONSERV. LAW §11-0535; N.C. GEN. STAT. §§113-331-337, 106-202.12; OHIO REV. CODE §§1531.24-.26, .99; OR. ADMIN. R. 635-100-0105; OR. REV. STAT. §§496.004, .171, .172-.192, 498.026, 527.610-527.885, 527.992, 564.100-.135; 30 PA. CONS. STAT. §2305; 34 PA. CONS. STAT. §2167; 17 PA. CODE §§45.31-.35; R.I. GEN. LAWS §§20-37-1-5; S.C. CODE §§50-15-10-90; S.D. CODIFIED LAWS 34A-8-1-13; TENN. CODE §§70-8-101-112; TEX. PARKS

& WILD. CODE §§49.015, 68.001-.021; 30 TEX. ADMIN. CODE §330.129; 31 TEX. ADMIN. CODE §§65.171, 69.1; UTAH CODE §§23-13-1-17; VT. STAT. tit. 10, §§5401-5410; VA. CODE §§29.1-563-570; WASH. REV. CODE §§77.12.020, 77.08.010, 77.15.005, 79.17.040; WIS. STAT. §29.604; *see also* MO. REV. STAT. §252.240; OKLA. STAT. tit. 29, §§5-412, 412.1, 7-206, 7-502-504, 7-601-602. Several States, including Texas, go even further, protecting "threatened" species as well. *See, e.g.*, 31 TEX. ADMIN. CODE §§65.171-.184, 69.1-.9; MASS. GEN. LAWS ch. 131A, §§1-6.

Clearly, invalidation of the Fifth Circuit's limitless application of the substantial effect test will not leave hapless intrastate fauna without protection. By displacing the state policy choices expressed by state laws protecting endangered species, however, the ESA renders the States' statutes and regulations largely irrelevant and discourages the further development of state regulatory schemes. The States should be allowed, and encouraged, to continue "perform[ing] their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *Lopez*, 514 U.S., at 581 (Kennedy, J., concurring). Federal control of state resources conflicts with the proper regard for the independence of state governments in carrying out their domestic policy. Rejection of the Fifth Circuit's boundless expansion of the commerce power would ensure that both intrastate natural resources and the now-endangered balance between federal and state sovereignty are preserved.

CONCLUSION

The Court should grant the petition for writ of certiorari, clarify the application of the substantial effect test, and reverse the court of appeals's judgment.

Respectfully submitted,

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No. 03-1619

IN THE

Supreme Court of the United States

GDF REALTY INVESTMENTS, LTD.; PARKE PROPERTIES I, L.P.; PARKE PROPERTIES II, L.P.,

Petitioners,

v.

GALE A. NORTON, SECRETARY OF THE INTERIOR, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR THE WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS AMICI CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

In every case in which this Court has relied upon the aggregation principle to sustain a federal regulation against a Commerce Clause challenge, "the regulated activity was of an apparent commercial character." The regulated activity here—potential interference with miniscule subterranean invertebrates that are wholly intrastate and lack any commercial value—is non-economic. Did the court of appeals err by relying upon aggregation to conclude that Congress has authority under the Commerce Clause to regulate this activity?

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BRIEF FOR THE WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS AMICI CURIAE SUPPORTING PETITIONER

Amici curiae Washington Legal Foundation (WLF) and Allied Educational Foundation (AEF) respectfully submit that the petition for a writ of certiorari should be granted.[1]

INTEREST OF AMICI CURIAE

WLF is a nonprofit public interest law and policy center based in Washington, D.C., with thousands of supporters nationwide. WLF engages in litigation and the administrative process in a wide variety of areas, including cases involving property rights and the scope of the federal government's Commerce Clause powers. In particular, WLF has argued as *amicus curiae* in several recent cases that the commerce power does not extend to federal regulation of wild animals. *See, e.g.*, *Rancho Viejo, LLC* v. *Norton*, 323 F.3d 1062 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 1506 (2004); *Solid Waste Agency of N. Cook County* v. *United States Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Gibbs* v. *Babbitt*, 214 F.3d 483 (4th Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001); *Nat'l Ass'n of Home Builders* v. *Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997) ("*NAHB*"), *cert. denied*, 524 U.S. 937 (1998).

AEF is a nonprofit charitable and educational foundation based in New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, including law

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[1] Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters consenting to the filing of this brief have been submitted to the Clerk.

and public policy. AEF has appeared as *amicus curiae* in many cases in which WLF is also involved, including *Rancho Viejo*, *Gibbs*, and *NAHB*.

ARGUMENT

The court of appeals held that the Commerce Clause affords Congress the authority to apply section 9(a)(1) of the Endangered Species Act (ESA), 16 U.S.C. § 1538(a)(1), which makes it unlawful to "take" any endangered species, to six species of largely sightless, subterranean invertebrates that live exclusively within caves in two Texas counties. Pet. App. 3-4.[2] The Cave Species, which grow to no more than 8 mm in length and spend their entire lives underground, have absolutely no commercial value. *Id.*

Petitioners have owned a 216-acre parcel of land in Travis County, Texas, for more than twenty years. Pet. App. 2. Their lawful efforts to develop that land, however, have been thwarted by the mere presence of the endangered Cave Species. Petitioners have attempted to ameliorate the Fish and Wildlife Service's (FWS) concerns by deeding several acres on which the Cave Species live to a nonprofit environmental organization and by fencing off other caves. *Id.* at 4, 48. FWS has nevertheless refused to grant petitioners the requisite permits to develop the property and has even threatened one of the owners with criminal prosecution for clearing brush on the land he owns with others. *Id.* at 4-6.

In an effort to realize their substantial financial investment in this property, petitioners initiated this suit and contended that, as applied to the wholly intrastate and commer-

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[2] These species—collectively referred to as the "Cave Species"—are the Bee Creek Cave Harvestman, the Bone Creek Harvestman, the Tooth Cave Pseudoscorpion, the Tooth Cave Spider, the Tooth Cave Ground Beetle, and the Kretschmarr Cave Mold Beetle. Pet. App. 2-3.

cially irrelevant Cave Species, section 9(a)(1) of the ESA exceeds the bounds of Congress' Commerce Clause authority. The district court—relying upon a rationale that has also been endorsed by the D.C. Circuit—upheld the constitutionality of the take prohibition on the ground that petitioners' planned commercial development, which includes a Wal-Mart and apartment complexes, has a substantial effect on interstate commerce. Pet. App. 65.

The Fifth Circuit expressly disavowed the lower court's reasoning but nonetheless affirmed its decision. The court of appeals held that the lower court was incorrect to focus its Commerce Clause analysis upon petitioners' future commercial development, rather than upon whether the regulated activity—the taking of Cave Species organisms—possesses the requisite link to interstate commerce. Pet. App. 22, 27. The court of appeals explained, "[t]o accept the district court's analysis would allow application of otherwise unconstitutional statutes to commercial actors, but not to non-commercial actors" and thereby "'effectually obliterate' the limiting purpose of the Commerce Clause." *Id.* at 23. The court concluded, however, that the prohibition on Cave Species takes is constitutional because it is essential to the economic regulatory scheme purportedly embodied in the ESA. *Id.* at 36. On this basis, the court deemed it permissible to aggregate takes of these non-economic, intrastate species with takes of all other endangered species. *Id.* By aggregating the effect of all endangered species takes—both commercial and noncommercial in nature—the court of appeals divined a substantial commercial nexus adequate to sustain the prohibition on Cave Species takes. *Id.*

Six judges dissented from the Fifth Circuit's refusal to rehear the case en banc. Pet. App. 75. Judge Jones' dissent identified a number of serious flaws in the panel's reasoning and observed that the "approval of aggregation in this case would not only sustain every conceivable application of the ESA, but entirely undercuts *Lopez* and *Morrison*." *Id.* at 80.

A. In *United States* v. *Lopez*, 514 U.S. 549 (1995), and *United States* v. *Morrison*, 529 U.S. 598 (2000), this Court refined the framework for evaluating the propriety of federal action under the Commerce Clause. The Court explained that there exist three categories of activities that Congress can regulate pursuant to its commerce power:

> First, Congress may regulate the use of the *channels of interstate commerce*. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or *persons or things in interstate commerce*, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate *those activities having a substantial relation to interstate commerce*, *i.e.*, those activities that substantially affect interstate commerce.

Lopez, 514 U.S. at 558-59 (citations omitted; emphases added); *see also Morrison*, 529 U.S. at 609. It is beyond reasonable dispute that the prohibition on Cave Species takes regulates neither the channels nor the instrumentalities of interstate commerce. Accordingly, the ESA's application to the Cave Species can be sustained, if at all, only if it regulates an activity that substantially affects interstate commerce.

Lopez and *Morrison* instruct that four inquiries are relevant to determining whether a regulated activity has a substantial effect on interstate commerce: (i) whether the regulation by its terms reaches commercial or economic activity; (ii) whether the regulation includes an express jurisdictional element; (iii) whether Congress has made findings regarding the regulated activity's effect on interstate commerce; and (iv) whether the link between the regulated activity and interstate commerce is direct or attenuated. *Lopez*, 514 U.S. at 559-65; *Morrison*, 529 U.S. at 610-12.

A faithful application of this test unequivocally demonstrates that the taking of a wholly intrastate and commercially irrelevant Cave Species organism does not substantially affect interstate commerce. The court of appeals avoided the implications of this inescapable conclusion by aggregating non-economic Cave Species takes with the takes of all other endangered species. This Court has *never* endorsed the aggregation of non-economic activity as part of "substantial effects" analysis. Indeed, such a methodology would significantly undercut the limitations inherent in Congress' Commerce Clause authority. This Court should grant certiorari to clarify that non-economic activities cannot be aggregated and to resolve the split in authority on this issue between the Fifth and the Ninth Circuits.

1. This Court explained in *Morrison* that "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." 529 U.S. at 613. The court of appeals recognized that the taking of Cave Species organisms is a non-economic activity, but nevertheless sustained application of the ESA's take prohibition to these commercially irrelevant species.

In order to determine whether a regulation reaches economic activity, it is necessary to focus upon the commercial attributes of the expressly regulated *activity*, rather than the commercial links of the regulated *entity*. In *Lopez*, for example, the Gun-Free School Zones Act made it illegal for "any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C. § 922(q)(1)(A). This Court explained that this is "a criminal statute that *by its terms* has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Lopez*, 514 U.S. at 561 (emphasis added). In framing its Commerce Clause inquiry, the Court looked to the activity that the statute's terms expressly regulated, and concluded

that commerce was not implicated because the relevant activity for Commerce Clause purposes was the carrying of a gun in a school zone. The fact that the defendant to whom the statute was being applied was engaged in commerce—he had brought the gun to school to sell it—did not alter the Court's conclusion that the statute did not regulate commercial activity. *See United States* v. *Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993).

Similarly, in *Morrison*, the provision of the Violence Against Women Act under consideration provided a federal civil remedy for the victims of gender-motivated violence. 42 U.S.C. § 13,981. This Court concluded that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity." *Morrison*, 529 U.S. at 613. Again, the Court framed its analysis in the terms of the statute itself and paid no heed to the activities in which the regulated individual was engaged.

Section 9(a)(1) of the ESA prohibits endangered species takes. The ESA defines "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in such conduct." 16 U.S.C. § 1532(19). As applied in this case, the statute by its terms proscribes the taking of a Cave Species organism, and the relevant question for Commerce Clause purposes is whether a Cave Species take constitutes commercial activity (and whether that activity has a substantial effect on interstate commerce). The answer to this question is clearly "no." The diminutive Cave Species organisms, which are found only in two Texas counties and spend their entire lives underground, have absolutely no commercial value.

It is irrelevant to this analysis that the activity threatening the Cave Species is petitioners' commercial development of their property. The court of appeals recognized as much, explaining:

> Neither the plain language of the Commerce Clause, nor judicial decisions construing it, suggest that, concerning substantial effect *vel non*, Congress may regulate activity (here, Cave Species takes) solely because non-regulated conduct (here, commercial development) by the actor engaged in the regulated activity will have some connection to interstate commerce.

Pet. App. 22.

It is therefore evident that the prohibition on Cave Species takes regulates an activity that lacks commercial (and interstate) attributes. Indeed, neither the taking of a single Cave Species organism nor the aggregated effect of all Cave Species takes has a substantial effect on interstate commerce. *See* Pet. App. 28-30 (rejecting the argument that Cave Species takes have a substantial effect on commerce attributable to the minor scientific interest in the species or their hypothetical future commercial benefits). Upon reaching this conclusion, the court of appeals should have ended its Commerce Clause analysis and invalidated the prohibition on Cave Species takes. Instead, the court held that—notwithstanding the noncommercial nature of the activity—it is permissible to aggregate Cave Species takes with the takes of all other endangered species, and thereby obtain the requisite substantial effect on interstate commerce. The court contended that aggregation of non-economic activity is appropriate where that activity is "'*an essential part of a larger regulation of economic activity*, in which the regulatory scheme *could* be undercut unless the intrastate activity were regulated.'" *Id.* at 13 (quoting *Lopez*, 514 U.S. at 561 (emphasis in original)). The court of appeals concluded, "ESA is an economic regulatory scheme; the regulation of intrastate takes of the Cave Species is an essential part of it. Therefore, Cave Species takes may be aggregated with all other ESA takes." *Id.* at 36.

The court of appeals misconstrued the language from *Lopez* that it quoted to support its aggregation of noncommercial activities. Indeed, this unwarranted expansion of the aggregation principle is at odds with both the letter and spirit of *Lopez*. *See Lopez*, 514 U.S. at 561 ("our cases [have upheld] regulations of activities that arise out of or are connected with a *commercial transaction*, which viewed in the aggregate, substantially affects interstate commerce" (emphasis added)). According to the court of appeals, Congress is authorized to regulate intrastate, noncommercial activities so long as it locates that regulation within the framework of a larger economic regulatory scheme. Such a boundless methodology eviscerates the reasonable—and constitutionally compelled—constraints that *Lopez* and *Morrison* sought to place on the commerce power.

There is no support in this Court's jurisprudence for the aggregation of noncommercial activities. The Court first endorsed the limited use of aggregation in *Wickard* v. *Filburn*, where a farmer's cultivation of wheat for home-consumption was aggregated with the consumption of other similarly situated individuals in order to sustain a provision of the Agricultural Adjustment Act of 1938. 317 U.S. 111, 127 (1942). Since then, "in every case where [this Court] ha[s] sustained federal regulation under *Wickard*'s aggregation principle, the regulated activity was of an apparent commercial character." *Morrison*, 529 U.S. at 611 n.4; *see also Hodel* v. *Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) (coal industry); *Perez* v. *United States*, 402 U.S. 146 (1971) (loan sharking); *Maryland* v. *Wirtz*, 392 U.S. 183 (1968) (wages of workers employed by businesses engaged in interstate commerce); *Katzenbach* v. *McClung*, 379 U.S. 294 (1964) (restaurant service); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964) (hotel accommodations).

The court of appeals' unprecedented expansion of the aggregation principle distorts the delicate balance between federal and state power by extending Congress' Commerce

Clause authority to intrastate, non-economic activity that the Constitution firmly places within the exclusive purview of the States. *See Morrison*, 529 U.S. at 617-18 ("The Constitution requires a distinction between what is truly national and what is truly local"). This Court should grant certiorari to clarify that the aggregation of noncommercial activity is not an acceptable mode of Commerce Clause analysis.[3]

2. The second aspect of substantial effects analysis is an inquiry into whether the statute includes an express jurisdictional element limiting its reach to matters that impact interstate commerce. The language of the ESA's take prohibition lacks any such limitation—a shortcoming that the court of appeals acknowledged but refused to accord any weight.

If section 9(a)(1) of the ESA did include a clause limiting its reach to takes that possess a connection with interstate commerce, takes of the wholly interstate and commercially irrelevant Cave Species would be excluded from the statute's

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[3] Moreover, even on its own terms, the court of appeals' analysis is flawed. The ESA is not an economic regulatory scheme. As the court of appeals correctly recognized in other portions of its opinion, to determine whether a statute regulates economic activity, it is necessary to focus upon the commercial characteristics of the regulated conduct without regard to the economic links of the regulated entity. Pet. App. 22. The ESA regulates the taking of endangered species—an activity that lacks a commercial nexus unless the regulated species itself has economic attributes. As applied to that significant category of commercially irrelevant endangered species—including the Cave Species, the arroyo toad, and the Delhi Sands Flower-Loving Fly—the ESA regulates non-economic conduct. The statute as a whole thus cannot accurately be classified as an *economic* regulatory scheme. Accordingly, even if it were permissible to aggregate non-economic activity essential to a larger economic regulatory program, aggregation would nevertheless be inapplicable in the context of the ESA.

scope. The absence of a jurisdictional element impermissibly extends the reach of the ESA to takes of all endangered species—including those that lack the constitutionally mandated nexus with interstate commerce. The result is a statute that is susceptible to as-applied challenges where, as here, the take in question does not fall within the confined boundaries of Congress' Commerce Clause authority.

3. The third factor that a court must weigh as part of its substantial effects analysis is whether Congress made legislative findings regarding the manner in which the regulated activity impacts interstate commerce. There are no legislative findings that address the (nonexistent) connection between Cave Species takes and interstate commerce. As with the absence of a jurisdictional element, the court of appeals did not give any weight to the lack of Cave Species-specific legislative findings and focused instead upon ambiguous congressional statements positing a generalized link between endangered species and human welfare. Pet. App. 33. The absence of species-specific legislative findings is critical because there is no other evidence that suggests that interference with the habitat of these diminutive subterranean invertebrates exerts a substantial effect on interstate commerce. "To the extent that congressional findings would enable [this Court] to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here." *Lopez*, 514 U.S. at 563.

4. The final issue that must be considered by a court engaged in substantial effects analysis is whether the link between the regulated activity and interstate commerce is so attenuated that there exists no logical stopping point to Congress' commerce power. *See Lopez*, 514 U.S. at 567 (explaining that it is impermissible for a court, in an effort to discern a link between a regulated activity and interstate commerce, to "pile inference upon inference in a manner that would bid fair to convert congressional authority under the

Commerce Clause to a general police power of the sort retained by the States"). Relying upon its aggregation of all endangered species takes, the court of appeals expended only two conclusory sentences dismissing the notion of an attenuation problem. Pet. App. 36.

When the substantial effects inquiry is reconfigured to reflect accurately the methodology outlined by this Court in *Lopez* and *Morrison*, however, significant attenuation problems emerge. Even if aggregation is employed, any link between the destruction of the habitat of the intrastate, economically irrelevant Cave Species and interstate commercial activity is dangerously attenuated. The court of appeals found such a connection by relying upon a hypothetical "interdependent web" binding all species. Under that theoretical framework, the link between harm to a nearly microscopic subterranean organism and interstate commerce can only be arrived at by undertaking vast inferential leaps and indulging questionable suppositions. If, through some Herculean feat of factual extrapolation, this Court were to find that a Cave Species take exerts a substantial impact on interstate commerce, then there would truly be no logical stopping point to confine Congress' Commerce Clause authority, and the distinction between the sphere of the federal government and that of the States would be wholly obliterated.

On the contrary, it is the States that have long enjoyed plenary authority over the wild animals within their borders. *See, e.g., Douglas* v. *Seacoast Prods., Inc.*, 431 U.S. 265, 287-88 (1977) (Rehnquist, J., concurring in part and dissenting in part) (it is "clear that the States have a substantial proprietary interest . . . in the fish and game within their boundaries"). The broad scope of state authority in this realm contrasts sharply with the narrow reach of the federal government, which is limited to regulating wild animals through invocation of its enumerated powers. *See, e.g., id.* (holding that the commerce power authorizes the regulation of animals within the nation's territorial waters (*i.e.*, the channels of

commerce)); *North Dakota* v. *United States*, 460 U.S. 300 (1983) (concluding that the spending power authorizes the federal government to acquire, by purchase or easement, private land that may be used as animal habitat); *Kleppe* v. *New Mexico*, 426 U.S. 529 (1976) (explaining that the federal government's property power authorizes it to proscribe the harming of wild animals on federal land); *Missouri* v. *Holland*, 252 U.S. 416 (1920) (holding that the treaty power authorizes the federal government to protect animals that are the subject of international concern). This Court has never held, however, that the commerce power authorizes the federal government to regulate wild animals *qua* wild animals. To the contrary, this Court has indicated that such regulation raises serious questions under the Commerce Clause, *see Solid Waste Agency of N. Cook County* v. *United States Army Corps of Eng'rs*, 531 U.S. 159, 173-74 (2001), and such an incident of centralization would do much to undermine the delicate federal/state balance that is the hallmark of Our Federalism.

In light of the foregoing, it is evident that—when applied correctly—each of the four factors that this Court identified in *Lopez*, and reaffirmed in *Morrison*, indicates that Congress lacks authority under the Commerce Clause to regulate Cave Species takes. This Court should grant certiorari to correct the court of appeals' flawed analysis and to clarify that it is impermissible for lower courts to circumvent the limitations on Congress' commerce power by engaging in the type of judicial legerdemain employed in this case.

B. The significant inconsistencies between the court of appeals' decision and the Commerce Clause framework outlined by this Court in *Lopez* and *Morrison* constitute a weighty reason to grant certiorari. The split between the Fifth and Ninth Circuits regarding the applicability of *Wickard*'s aggregation principle to non-economic activity, as well as the sharp disagreement among both lower-court judges and legal scholars regarding the constitutionality of

endangered species regulations, further demonstrate the necessity for a definitive ruling from this Court.[4]

The Ninth Circuit has repeatedly and explicitly proclaimed a categorical rule against the aggregation of noncommercial activity. In *United States* v. *McCoy*, 323 F.3d 1114 (9th Cir. 2003), for example, the Ninth Circuit invalidated a statute making it unlawful to possess child pornography manufactured with implements that move in interstate commerce. The court disavowed a Third Circuit decision that had utilized aggregation to sustain the same provision, and, in so doing, it held that "*Wickard*'s theory of aggregate impact . . . applies *only* when the regulated intrastate activity is a commercial or economic one." *Id.* at 1122 n.17 (emphasis in original; internal quotation marks omitted); *see also United States* v. *Stewart*, 348 F.3d 1132 (9th Cir. 2003) (holding that a federal statute prohibiting the possession of machineguns contravened the Commerce Clause when applied to a defendant who assembled a homemade weapon for his own collection, and refusing to aggregate the defendant's

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[4] Moreover, the frequency with which the federal government invokes the ESA in the name of wholly intrastate, noncommercial species evidences the significant real-world repercussions of this issue. *See, e.g.*, Botkin, *Firth Bridge Work Still Slowed by Endangered Snails in River*, Idaho Falls Post Reg., Dec. 10, 2003, at A1 (demolition of bridge delayed while FWS studies the impact on the Utah Valvata Snail); Kresge, *Fontana Project Hits Old Snag; D.C. Meeting Fails to Give Any Ground for Empire Center's Impact on Endangered Flower-Loving Fly*, San Bernardino Sun, Oct. 16, 2003 (planned development placed in doubt due to the presence of the Delhi Sands Flower-Loving Fly); Witt, *A Showcase and a Battleground; Fry, Regulators at Odds over How to Protect Habitat at Golf Course*, San Jose Mercury News, July 13, 2003, at A1 (modifications to golf course required to protect the California Red-Legged Frog).

non-economic activity with that of similarly situated persons).

The Ninth Circuit's categorical prohibition upon the aggregation of noncommercial activities is inconsistent with the Fifth Circuit's conclusion in this case that aggregation is appropriate where a noncommercial activity is an essential component of an economic regulatory scheme. This methodological disagreement has profound ramifications for Commerce Clause jurisprudence. The choice between the Fifth Circuit's expansive conception of aggregation and the Ninth Circuit's constrained application of this principle is a proxy for whether this Court's recent Commerce Clause decisions are to have any enduring jurisprudential effect. Indeed, the Fifth Circuit's methodology, which facilitates the extension of the federal commerce power to areas of traditional state concern, harkens back to the pre-*Lopez* era during which Congress exercised a seemingly boundless Commerce Clause authority. *See* Kozinski, *Introduction to Volume 19*, 19 Harv. J.L. & Pub. Pol'y 1, 5 (1995) (writing that in the pre-*Lopez* era the Commerce Clause should more accurately have been known as the "'Hey, you-can-do-whatever-you-feel-like Clause'"). Certiorari is therefore warranted to address this disagreement among the circuits and to reaffirm the holdings of *Lopez* and *Morrison*.

In addition to this split concerning the scope of the aggregation principle, the circuits also disagree about the proper focus of the substantial effects inquiry. Whereas the Fifth Circuit has endorsed a methodology that considers only the commercial links of the activity expressly regulated by the statute's terms, *see* Pet. App. 22, the D.C. Circuit has formulated an expanded inquiry—akin to that employed by the district court in this case—that focuses upon the commercial attributes of the regulated entity itself. In *Rancho Viejo, LLC* v. *Norton*, 323 F.3d 1062 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 1506 (2004), the court upheld a regulation precluding

cluding takes of the intrastate, economically irrelevant arroyo toad solely because the take was committed by a real-estate development company that had connections with interstate commerce. In so doing, the D.C. Circuit disregarded this Court's clear instruction in *Lopez* and *Morrison* that the expressly regulated activity—*i.e.*, the endangered species take—is the proper object of the substantial effects inquiry. Conversely, the Fifth Circuit's refusal to consider petitioners' economic links as part of its substantial effects analysis represents a faithful implementation of this Court's guidance.

Judge Sentelle, dissenting from the denial of rehearing en banc in *Rancho Viejo*, recognized the split between the Fifth and D.C. Circuits on this issue, stating that the panel's decision "is . . . conspicuously in conflict with another circuit. The Fifth Circuit has explicitly rejected the claim that federal regulation protecting a noncommercial species is permissible if the activity constituting the 'take' was itself economic." 334 F.3d 1158, 1159 (D.C. Cir. 2003) (Sentelle, J., dissenting from denial of rehearing en banc). Judge Roberts acknowledged the same point. *Id.* at 1160 ("the approach of the panel in this case and *NAHB* now conflicts with the opinion of a sister circuit . . . ") (Roberts, J., dissenting from denial of rehearing en banc). This Court should act to resolve the split between these two circuits and to reaffirm the proposition that Congress' commerce power is not without limits.

The pressing need for this Court's attention is further evidenced by the divergent rationales that the lower courts have adopted to sustain the ESA against the frequent Commerce Clause challenges that have followed on the heels of *Lopez* and *Morrison*. *See Rancho Viejo*, 323 F.3d 1062 (arroyo toad takes); *Gibbs* v. *Babbitt*, 214 F.3d 483 (4th Cir. 2000) (red wolf takes), *cert. denied*, 531 U.S. 1145 (2001); *Nat'l Ass'n of Home Builders* v. *Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997) ("*NAHB*") (Delhi Sands Flower-Loving Fly takes), *cert. denied*, 524 U.S. 937 (1998). Although each

such decision has ultimately sustained the regulation at issue, a number of these holdings have drawn vigorous dissents from a member of the court (and in *NAHB*, a critical separate concurrence as well). *See Gibbs*, 214 F.3d at 506 (Luttig, J., dissenting); *NAHB*, 130 F.3d at 1060 (Sentelle, J., dissenting); *id.* at 1057 (Henderson, J., concurring); *see also Rancho Viejo*, 334 F.3d at 1158 (Sentelle, J., dissenting from denial of rehearing en banc); *id.* at 1160 (Roberts, J., dissenting from denial of rehearing en banc). The judicial disarray occasioned by the ESA is further evidenced by the fact that *six* judges dissented from the Fifth Circuit's refusal to rehear this case en banc. Pet. App. 75 (Jones, J., joined by five other judges, dissenting from denial of rehearing en banc).

The irreconcilable reasoning of the majorities in each of these decisions is indicative of the confusion that this area of the law has fomented among lower courts—and the great lengths that these courts will go to uphold endangered species protections. In the instant case, the court of appeals upheld the prohibition on Cave Species takes because it found the regulation to be essential to the economic regulatory scheme purportedly embodied in the ESA. Pet. App. 36. The D.C. Circuit sustained the ESA's take provision as applied to the arroyo toad because the entity responsible for the take was engaged in the commercial activity of home construction. *Rancho Viejo*, 323 F.3d at 1072. The Fourth Circuit found a commercial link between red wolf takes and the tourism, scientific research, and (hypothetical) pelt trade fostered by the species and so upheld the regulation before it. *Gibbs*, 214 F.3d at 492.[5] In *NAHB*, Judge Wald held that the

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[5] The *Gibbs* court undertook its Commerce Clause inquiry in a manner similar to that employed by the D.C. Circuit in *Rancho Viejo*, and thus the Fourth Circuit is also implicated in the circuit split concerning the correct framing of substantial effects analysis. The Fourth Circuit determined that the conduct being regulated by the prohibition on red wolf takes was economic in

prohibition on takes of the Delhi Sands Flower-Loving Fly was valid because the elimination of an endangered species "would have a staggering effect on biodiversity . . . and, thereby, on the current and future interstate commerce that relies on the availability of a diverse array of species" for their medicinal and genetic value. 130 F.3d at 1052. In upholding the regulation, Judge Wald also relied upon the rationale that endangered species takes are the product of "destructive interstate competition," in the form of a race-to-the-bottom to attract development at the expense of the environment's well-being. *Id.* at 1054. In her concurrence, Judge Henderson expressly rejected as unduly speculative Judge Wald's invocation of the present and future commerce in endangered species. *Id.* at 1058 (Henderson, J., concurring). Instead, Judge Henderson argued that the regulation was constitutional because the extinction of species will impact "land and objects that are involved in interstate commerce." *Id.* at 1059.

This disagreement among lower-court judges has been mirrored in the legal academy, with scholars both criticizing and commending the court of appeals decisions upholding endangered species regulations against Commerce Clause challenges. *Compare* Adler, *The Ducks Stop Here? The Environmental Challenge to Federalism*, 9 Sup. Ct. Econ. Rev. 205 (2001), *and* Park, *The Endangered Species Act: Does It Have a Stopping Point?*, 4 Engage 58 (2003), *with* Fitzgerald, *Seeing Red:* Gibbs v. Babbitt, 13 Vill. Envtl. L.J. 1

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nature because the "[f]armers and ranchers take wolves mainly because they are concerned that the animals pose a risk to commercially valuable livestock and crops." *Gibbs*, 214 F.3d at 492. By focusing upon the economic motivations of the individuals responsible for the take—rather than upon the commercial connections of the take itself—the Fourth Circuit committed the same framing error that hampered the D.C. Circuit's analysis.

(2002), *and* Mank, *Protecting Intrastate Threatened Species: Does the Endangered Species Act Encroach on Traditional State Authority and Exceed the Outer Limits of the Commerce Clause?*, 36 Ga. L. Rev. 723 (2002). *See also* Saad, *Commerce Clause Jurisprudence: Has There Been a Change?*, 23 J. Land Resources & Envtl. L. 143, 172 (2003) ("The Supreme Court must give a clear directive to the lower courts on how to handle environmental regulation passed under the Commerce Clause.").

In light of the multitude of theories promulgated by judges presented with Commerce Clause challenges to prohibitions on interference with commercially irrelevant, intrastate species, certiorari is warranted to afford this Court the opportunity to reconcile these divisions among the federal judiciary and to analyze this issue in a manner faithful to the framework set forth in *Lopez* and *Morrison*. *Cf. Cargill, Inc.* v. *United States*, 516 U.S. 955, 955 (1995) (Thomas, J., dissenting from denial of certiorari) (recognizing that "serious and important constitutional questions" about the limits of Congress' commerce power to regulate wild animals "provide a compelling reason to grant certiorari").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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